132-125

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~308.~~ 44

LEWIS W. SMITH, PLAINTIFF IN ERROR,

vs.

RICHARD J. BOLLES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED AUGUST 2, 1886.

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1 The United States of America to Richard J. Bolles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, eastern division, wherein Lewis W. Smith is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, dist. judge U. S. and one of the judges of said circuit court, this 5th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

M. WELKER,
Dist. Judge U. S., N. D. O.

2 On this sixth day of May, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared John Odell, deputy marshal of the United States for the northern district of Ohio, before me, the subscriber, O. C. Beatty, United States commissioner for said district, and makes oath that he delivered a true copy of the within citation to E. J. Estep, of the firm of Estep, Dickey & Squire, attorneys of record for the within-named Richard J. Bolles, the said Richard J. Bolles not being found within said northern district of Ohio and having no residence therein.

JOHN ODELL.

Sworn to and subscribed the sixth day of May, A. D. 1886.

O. C. BEATTY,
U. S. Commissioner, N. D. O.

Service	2 00
Copy	50
Travel	50
	3 00

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, the judges thereof, between Richard J. Bolles, plaintiff, and Lewis W. Smith, defendant, a manifest error hath happened, to the great damage of the said Lewis W. Smith, as by his complaint appears,

we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 5th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS,
Clerk of the Circuit Court of the United States, N. D.O., East. Div.

Allowed by—
——— ———.

3*a* UNITED STATES OF AMERICA,
Eastern Division, Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that, in obedience to the command of the within writ of error, the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at office, in the city of Cleveland, this 19th day of July, A. D. 1886.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

3*b* Be it remembered that heretofore, to wit, on the 21st day of February, A. D. 1884, the following petition was filed in this cause in said court; which petition is in the words and figures following, viz:

Petition.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Petition for money only.

Richard J. Bolles, plaintiff, says he is a citizen of the State of New

York and resident in the city of New York; that the defendant, Lewis W. Smith, is a citizen of the State of Ohio and resident in Ashtabula county, in said eastern division of said northern district. The plaintiff says, further, that some time in the fall of 1879 the defendant and one Joseph W. Haskins entered into a fraudulent combination to form an incorporated mining company based upon alleged mining property in Pinal county, Territory of Arizona, and for the alleged purpose of mining silver ore therefrom and milling the same for market; that title to said property was claimed to be in said Haskins; that some time in October, 1879, as plaintiff is informed and believes and so charges the fact to be, said Haskins, Smith, and others organized said corporation, under the laws of New York, under the name of "The Irene Mill and Mining Company," representing a capital of $2,000,000, divided into 100,000 shares of $20.00 each; that said Haskins took the whole of the stock and paid for the same by transferring to said company said alleged mining property, and apparently for said sum of $2,000,000;
3c that said Haskins and Smith then represented that 60,000 shares of said stock so issued to or paid for by said Haskins *was* deposited with the treasurer of said company to be sold to subscribers and purchasers, and the proceeds, when secured, to be applied to the construction of a stamp mill to be connected with said supposed mining property and for the purpose of sinking shafts, making tunnels, and developing the mines; that the defendant had, in connection with said Haskins, some interest in said stock, the extent of which depended upon the amount of stock he should sell; that plaintiff was at the time wholly ignorant of the value of said stock and of the mining property on which it was based; that on or about the month of February, 1880, the defendant applied to plaintiff to buy or subscribe for some of said stock, and stated that he had an interest in the property or stock; that before acquiring an interest he had learned from said Haskins the location of the property and its enormous value as a mining property, and to satisfy himself he had gone to Arizona and thoroughly examined it, and to induce the plaintiff to buy or take some of said stock he represented the mining district to be new, with few, if any, inhabitants; that Mexicans, without machinery, were making enormous profits weekly and monthly; that the introduction of machinery would largely increase profits; that the surrounding country was full of rich-paying ore, and if his company had no ores very large profits could and would be made by milling the ores alone; that the mine was an enormous fissure vein 40 or 50 feet wide; they had a very large amount of pay ore on dump at the mouth of the shaft, enough to run the mill for a long time; that he had been in and through the mine; that he had procured assays
4 of the ores taken indiscriminately from the ores in the shaft and tunnel, and that it produced from 125 to 150 dollars per ton of silver and portions of it much more and over $200 per ton; that loss was impossible, because there was sufficient ore on the dump to pay the entire outlay for mill and expenses and, second, because the profits on milling ore for others would be large enough to pay

everything; that he had been into the shaft and taken from it the ores the value of which he had represented; that the shaft was more than one hundred feet deep and showed good ores all the way, and that no investment could be made that could or would result in larger and quicker returns; and the plaintiff says that, relying wholly upon the representations of said Smith and without knowledge or suspicion that the same was untrue and at the special instance and request of said Smith, he, on or about February —, 1880, agreed to buy of said Smith 4,000 shares of said stock at $1.50 per share; that by direction of said Smith he paid the money in the months of February and March, 1880, to wit, $6,000, to one H. J. Davis, who claimed to act as treasurer of said Irene Mill and Mining Company, and received from him certificates for four thousand shares of the capital stock of said company in completion of the contract so made with defendant.

Plaintiff, in fact, says that said mining district was not new; that other mills were then in use in the immediate vicinity; that Mexicans were not making enormous profits or any profits in handling said ores with or without machinery; that no profits could be made by milling ores from said supposed mine or other mines in
5 the vicinity; that neither the said Smith and Haskin nor said company had a large amount of pay ore or any ore on dump at said supposed mine, nor was there ore in the vicinity which could or would make such mill profitable; that the shaft was less than fifty feet deep; that it did not show any good or workable ores; that said Smith did not procure assays of said ores taken indiscriminately from the shaft showing from $125 to $150 per ton or any quantity sufficient for successful mining; that each and all of the representations made as aforesaid by defendant were false and untrue and were at the time known to said defendant to be false and untrue and were so made by defendant to cheat and defraud the plaintiff; that he was induced wholly by said representations to pay his said money; that said mining property is wholly worthless as such and was known to said defendant to be worthless at the time of making said representations.

Wherefore plaintiff says he has sustained damages by reason of the premises to the amount of $15,000.

2. The plaintiff, for a further cause of action against said defendant, L. W. Smith, says that he here adopts the statements in the first count of this petition set forth and makes the same part of this cause of action to the same extent as if here rewritten, except as to the number of shares purchased, the amount paid, and the damages claimed. He says that J. H. Bolles is his brother; that they were together at some of the negotiations and conversations with the defendants in relation to said supposed mining property and said stock, and this plaintiff communicated to him the representations hereinbefore set forth; that said defendant, to induce said J. H. Bolles to purchase, take, and pay for 2,000 shares of said stock, thus made to him each and all of the false and fraudulent statements and
6 representations specifically set forth in said first cause of action; that said J. H. Bolles believed said representations,

and, so believing them, was thereby induced to and did purchase 2,000 shares of said stock at and for the price of $1.50 per share, and by direction and request of said defendant paid to said H. J. Davis the sum of $3,000, being the sum so agreed upon with the defendant.

That the defendant, when he made to said J. H. Bolles said several representations, well knew they and each of them were false and untrue and fraudulently intended thereby to cheat and deceive the said J. H. Bolles; that each and all of said representations were in fact false and untrue and the said J. H. Bolles was thereby cheated and defrauded; that by reason of the premises an action accrued to the said J. H. Bolles to have and recover of said defendant said sum of $3,000, with interest from the time of payment, to wit, from April 1st, 1880; that afterwards and before the commencement of this action the said J. H. Bolles sold, assigned, and transferred his said claim to the plaintiff, who is now the owner and holder thereof, and that there is due to him on account thereof $3,000, with interest from April 1st, 1880; that said J. H. Bolles then was and still is a citizen of the State of New York and not a citizen or resident of the State of Ohio.

3. The plaintiff, for a further cause of action against said defendant, L. W. Smith, says that he here adopts the statements in the first count of the petition set forth and makes the same part of this cause of action to the same extent as if here rewritten, except as to the number of shares purchased, the amount paid, and the damages claimed. He says that L. W. Marsteller was at the time of
7 the purchase hereinafter stated and still is a citizen of the State of New York; that on or about June 22nd, 1880, said Marsteller bought from defendant Smith 800 shares of said Irene Mill and Mining Company stock at and for the price of two dollars per share, which he then and there paid to said defendant in money; that said defendant, to induce said Marsteller to purchase, take, and pay for said 800 shares of said stock, made to him each and all of the false and fraudulent statements and representations specifically set out and stated in said first cause of action, and many more; that said L. W. Marsteller believed said representations, and, so believing them, was thereby induced to and did purchase said 800 shares of said stock at and for the price of two dollars per share, which said sum, to wit, $1,600, he then and there paid to said defendant and received from him a certificate for the shares so purchased; that defendant, when he made to the said L. W. Marsteller said several representations, well knew that they and each of them were false and untrue and fraudulently intended thereby to cheat and deceive the said L. W. Marsteller; that each and all of said representations were in fact false and untrue and the said Marsteller was thereby cheated and deceived; that said stock was in fact wholly worthless; that by reason of the premises an action accrued to said L. W. Marsteller to have and recover of said defendant said sum of $1,600, with interest from the time of payment, to wit, from said June 22nd, 1880; that afterwards and before the commencement of this action the said L. W. Marsteller sold, assigned, and transferred his said claim to this

plaintiff, who is now the owner and holder thereof, and that
8 there is due to him on account thereof as such owner and holder said sum of $1,600, with interest from June 22nd, 1880.

4. The plaintiff, for a further cause of action against said defendant, L. W. Smith, says that he here adopts the statements in the first count of this petition set forth and makes the same part of this cause of action to the same extent as if here rewritten, except as to the number of shares purchased, the amount paid, and the damages claimed. He says that Mary Manchester was at the time of the purchase hereinafter stated and still is a citizen of the State of New York and resident of the city of New York; that on or about June 1st, 1880, said Mary Manchester bought from the defendant Smith 225 shares of the said Irene Mill and Mining Company stock at and for the price of two dollars per share, which she then and there paid to said defendant in money; that said defendant, to induce the said Mary Manchester to purchase, take, and pay for said 225 shares of stock, made to her each and all of the false and fraudulent representations or statements specifically set out and stated in said first cause of action, and many more; that said Mary Manchester believed said representations and statements, and, so believing them, was thereby induced to and did purchase of said defendant said 225 shares of stock at and for the price aforesaid; that defendant, at the time of making said representations, well knew that they and each of them were false and untrue and fraudulently intended thereby to cheat and deceive the said Mary Manchester; that each and all of said representations were in fact false and untrue and the said Mary Manchester was thereby cheated and deceived; that said stock was in fact wholly worthless; that by reason of
9 the premises an action accrued to said Mary Manchester to have and recover from said defendant said sum of $450, with interest from June 1st, 1880; that afterwards and before the commencement of this action the said Mary Manchester sold, assigned, and transferred her said claim to the plaintiff, who is now the owner and holder thereof, and that there if due to him on account thereof as such owner and holder said sum of $450, with interest after June 1st, 1880.

5. The plaintiff, for a further cause of action, says that he here adopts the statements in the first count of this petition set forth and makes the same part of this cause of action to the same extent as if here rewritten, except as to the number of shares purchased, the amount paid, and the damages claimed. He says that John Van Gassbeck was at the time of the purchase hereinafter stated and still is a citizen of the State of New York and resident in the city of New York; that on or about August 1st, 1880, said John Van Gassbeck bought of and from the defendant Smith 2,500 shares of the said Irene Mill and Mining stock at and for the price of two dollars per share, which he then and there paid to said defendant in money, to wit, $5,000; that said defendant, to induce the said John Van Gassbeck to purchase, take, and pay for said stock, made to him each and all of the false and fraudulent representations and statements specifically set out and stated in said first cause of action, and also

stated that he was thoroughly familiar with said mine; that he had taken out ores from different parts of it, and that its assays run from $175 to $250 per ton, and that to show his faith in the mine he had sold a house in New York, before owned by him, for $30,000 and put
10 every dollar of it into the mine; that defendant had with him a man named Snedecor, who stated in the presence of defendant that he, defendant, was a man who stood high in Ashtabula, Ohio, where he lived; that he was president of a bank, a merchant, and a man of large wealth and could be relied on; that said John Van Gassbeck believed said representations and statements, and, so believing them, was thereby induced to and did purchase of said defendant said 2,500 shares of stock at and for the price aforesaid; that defendant, at the time of making said representations, well knew that they and each of them were false and untrue and fraudulently intended thereby to cheat and deceive the said John Van Gassbeck; that each and all of said representations were in fact false and untrue and the said John Van Gassbeck was thereby cheated and deceived; that said stock was in fact wholly worthless; that said mine was at no time of any value; that at the time of purchasing said stock the certificate for the same was, at the request of said John Van Gassbeck, issued to Mary A. Van Gassbeck, his wife, but without consideration on her part; that by reason of the premises an action accrued to said John Van Gassbeck to have and recover from said defendant said sum of $5,000, with interest from June 1st, 1880; that afterwards and before this action was commenced the said John Van Gassbeck and Mary A. Van Gassbeck sold, assigned, and transferred his and their claim to the plaintiff, who is now the owner and holder thereof, and that there is due to him on account thereof as such owner and holder said sum of $5,000, with interest after June 1st, 1880.

11 The plaintiff further says that he holds, by reason of the purchases and transfers aforesaid, the certificates of each and all of said purchases, and he here offers to bring them into court to be disposed of as the court shall direct.

The plaintiff therefore prays judgment against the defendant, L. W. Smith, for the sum of $25,050.00, with interest on $18,000.00 from April 1st, 1880; on $1,600 from June 22nd, 1880; on $5,450 from June 1st, 1880, and for other proper relief.

ESTEP, DICKEY AND SQUIRE, *Attorneys.*

DAVENPORT AND LEEDS, *Of Counsel.*

THE STATE OF NEW YORK, *County and City of New York,* } ss:

Richard J. Bolles, being sworn, says that the facts in the foregoing petition set forth are true, as he believes.

RICHARD J. BOLLES.

Sworn to and subscribed by said R. J. Bolles before me and in my presence February 20th, 1884.

Witness my signature and official seal hereto affixed, at city of New York, this 20th day of February, A. D. 1884.

[SEAL.] R. G. BUTLER,
Notary Public, Westchester Co.

Cert. filed in N. Y. Co.

RICHARD J. BOLLES, Pl't'ff, *vs.* LEWIS W. SMITH, Def't.

12 Issue summons for defendant, returnable according to law; suit brought for $25,050.00, with interest on $18,000 after April 1st, 1880; on $1,600 after June 22nd, 1880; on $5,450 after June 1st, 1880.

ESTEP, DICKEY AND SQUIRES, *Att'ys.*

DAVENPORT AND LEEDS, *Of Counsel.*

And afterwards, to wit, on the 29th day of February, A. D. 1884, the following summons was filed in this cause in said court, viz:

Summons.

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to notify Lewis W. Smith that he has been sued by Richard J. Bolles in the circuit court of the United States within and for the said district, and that unless he answers by the 22nd day of March, A. D. 1884, the petition of the said plaintiff against him filed in the clerk's office of said court, at Cleveland, in said district, such petition will be taken as true and judgment will be rendered accordingly. You will make due return of this summons on the 3rd day of March, A. D. 1884.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 21st day of February, A. D. 1884, and in the 108th year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk,*
By O. C. BEATTY,
Deputy Clerk.

13 Returnable 2nd Monday after issued; ans. by 3rd Saturday after return day.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 28th day of February, 1884, at Ashtabula, Ohio, I delivered to the within-named Lewis W. Smith a true and duly certified copy of this writ.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

Felix Nicola has acknowledged himself security for all costs for which the plaintiff may be liable in this suit.

(Endorsed:) Summons. Suit brought for $25,050.00, with interest on $18,000 after April 1st, 1880; on $1,600 after June 22nd, 1880; on $5,450 after June 1st, 1880. Returnable March 3rd, 1884. Rule for answer March 22nd, 1884. Returned and filed February 29th, 1884. A. J. Ricks, clerk.

14 And afterwards, to wit, on the 6th day of October, A. D. 1884, the following answer was filed in this cause in said court, viz:

Answer.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Now comes the said defendant, Lewis W. Smith, and for answer to the petition of the plaintiff says that he admits the citizenship and residence of the plaintiff and of this defendant as in said petition set forth; and for further answer to the petition of the plaintiff this defendant says that he denies each and every other allegation and statement in said petition contained. Whereupon this defendant, having fully answered, asks to be dismissed with his costs.

BOYNTON AND HALE AND
NORTHWAY AND FITCH,
Att'ys for Defendant.

THE STATE OF OHIO, } ss:
Ashtabula County, }

Lewis W. Smith, being first duly sworn, on oath says that he is the defendant in the above action, and that all of the facts stated and allegations in his foregoing answer are, as he believes, true.

L. W. SMITH.

Sworn to before me and signed in my presence this 4th day of October, A. D. 1884.

Witness my hand and notarial seal.

[SEAL.] R. W. CALVIN,
Notary Public in and for Ashtabula County, Ohio.

15 And afterwards, to wit, on Monday, March 1st, A. D. 1886, and on each of the days following, being days of the February term, A. D. 1886, of said court—present, the Honorable Martin Welker, district judge—the following proceedings were had in this cause in said court, viz:

Order to Empanel a Jury.

This day came the parties, by their counsel, and a jury, being called, came, to wit, David Skeals, Egbert Hutchinson, David At-

water, Henry Beatty, Daniel Haun, James H. Strong, John Nelson, M. A. Day, Charles Frantz, J. P. Cowan, Joseph P. Bell, and Edward Morehouse, who, being elected, were duly empanelled and sworn to well and truly try the issues joined between the parties at bar, and, after counsel had made a statement of the case to the jury, the further hearing of the case was postponed until to-morrow.

Order Giving Plaintiff Leave to File Amended Petition.

TUESDAY, *March 2nd*, 1886.

This day came the parties, by their counsel, and came also the jury as heretofore empanelled and sworn herein, and, upon the application of the plaintiff, it is ordered that he *has* leave to file an amended petition *instanter* upon terms as to the payment of costs, to be determined hereafter, and, said petition having been filed, the trial proceeded. Testimony was offered by plaintiff, but not closed, when further proceedings were continued until to-morrow.

And afterwards, to wit, on the 2nd day of March, 1886, the following motion was filed in this cause in said court, viz:

Motion to Strike Out Parts of Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Motion.

16 The defendant, Lewis W. Smith, now comes and moves the court to order stricken from the amended petition the second, third, fourth, and fifth causes of action in said amended petition contained, for the reason that the same are not amendments of the second, third, fourth, and fifth causes of action set forth in the original petition, nor are either of said causes of action in said amended petition contained an amendment of any cause of action contained in the original petition set forth, but each of said causes of action in the amended petition above specified is a new and different cause of action from any contained in the original petition.

NORTHWAY AND FITCH AND
BOYNTON AND HALE,
Att'ys for Def'ts.

And afterwards, to wit, on March 2nd, 1886, the following amended petition was filed in this cause in said court, viz:

Amended Petition.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Richard J. Bolles, plaintiff, says he is a citizen of the State of New York and resident of the city of New York; that the defendant, Lewis W. Smith, is a citizen of the State of Ohio and resident of said northern district and eastern division. The plaintiff says that some time in the fall of 1879 the defendant and one Joseph W. Haskins entered into a fraudulent combination to form an incorpo-
17 rated company based upon alleged mining property in the Territory of Arizona and for the alleged purpose of mining and milling silver ore for market; that title to said property was claimed to be in said Haskins; that some time in October, 1879, as plaintiff is informed and believes and so charges, said Haskins and others organized said corporation, under the laws of New York, under the name of the Irene Mill and Mining Company, representing a capital of $2,000,000, divided into 100,000 shares of twenty dollars each; that said Haskins took the whole of the stock and paid for the same by transferring to said company said alleged mining property and apparently for said sum of $2,000,000; that said Haskins and Smith then represented that 60,000 shares of said stock so issued to or paid for by said Haskins *was* deposited with the treasurer of said company to be sold to subscribers and purchasers and the proceeds to be applied to the construction of a stamp mill to be connected with said supposed mining property and for the purpose of further sinking the shaft and tunnel then in progress; that the defendant had, in connection with said Haskins, some interest in said stock, the extent of which was then and still is unknown to plaintiff.

That plaintiff was wholly ignorant of the value of said stock and of the mining property on which it was supposed to be based; never having dealt in such stock or property; that in the month of February, 1880, the defendant applied to him to buy and subscribe for some of said stock. He stated that he was interested in the stock; that before acquiring an interest he had learned from said Haskins the location of the property and its enormous value as a mining property, and to satisfy himself he had gone
18 to Arizona and thoroughly examined it, and, to induce the plaintiff to buy or take some of said stock, he represented to plaintiff that the mining district in which said alleged property was located was new, with few, if any, inhabitants; that Mexicans without machinery were making enormous profits weekly and monthly; that the introduction of machinery would largely increase the profits; that the surrounding country was full of rich-paying ore, and if his company had no ores very large profits could and would be made by milling the ores from other places alone; that the mine was an enormous fissure vein 40 or 50 feet wide; that they had a very large

amount of pay ore on dump at the mouth of the shaft, to wit, several hundred tons, and enough to run a mill for a long time. He said he had been in the mine and examined thoroughly; that he had procured assays of the ores, taken by himself indiscriminately from the mine in the shaft and tunnel, and that it assayed and produced from $125 to 150 per ton of silver and portions of it much more and over $200 per ton; that loss was impossible, because there was sufficient ore on the dump to pay the entire outlay for the mill and expenses and, second, because the profit on milling ore for others would be large enough pay everything; that he had been in the shaft and taken from it the ores he had spoken of; that the shaft was more than one hundred feet deep and showed good paying ores all the way, and that no investment could be made that could or would result in larger and quicker returns. He also said he had put in his house and lot and cash; that he had gone to examine the mine on purpose, and at a cost of $700 or more, to satisfy himself; that there
19 was no stamp mill in that part of the country; that it would cost only $25 per ton to mine and mill the ore, and that it was a milling ore; that on account of the vast amount of ore then in sight such a chance would not occur once in a lifetime; that he, plaintiff, had known defendant for several years and believed him to be a truthful, honest man, and without knowledge or suspicion that said representations were untrue; but, believing and relying on the same, he, at the request of the defendant, in the month of February, 1880, agreed to buy of said Smith 4,000 shares of said stock at $1.50 per share, which contract was completed in the month of March, 1880, by the payment in full of the purchase price, to wit, $6,000, to one H. J. Davis, who claimed to act as treasurer of said company, and received from — certificates for said stock some time in the month of March, 1880. Plaintiff, in fact, says that said representations were each and all false and fraudulent; that said mining district was not new; that other mills had been constructed within a few miles of said supposed mine; that Mexicans were not making enormous profits or any profits in handling ores, with or without machinery, in said district or vicinity; that no profits could be made from said supposed mine or other supposed mines in the vicinity; that said ore, if any there was, was not a milling ore, but a smelting ore; that there was not any paying ore, in large or small quantities, on the dump at the mouth of said shaft or in or about said mine—either several hundred tons or any other quantity—nor was there ore in the vicinity that could or would make a mill profitable; that the shaft was less than fifty feet deep; that it did not show good or working ore all the way or part of the way down; that defendant had never been in the shaft or mine; that he never had the assays
20 made, as stated by him; that he had not put money into the stock or mine nor sold his house and lot to be paid for in said stock, and the same is still owned by himself or wife; that each and all of the representations so made by the defendant, except that he had been out and examined the mine, were false and untrue and were at the time known to be false and untrue by the defendant and were so made by defendant to cheat and defraud the plaintiff; that he

relied wholly upon them and was thereby induced to purchase said stock and pay his money as aforesaid; that said stock and mining property was then and still is wholly worthless; that had the same been as represented by defendant it would have been worth at least $10 per share, and so plaintiff says that by reason of the premises he has sustained damages to the amount of $40,000.

No. 2. The plaintiff further says that John H. Bolles is a citizen of the State of New York; that the Irene Mill and Mining Company and its supposed property was organized and located as in the first paragraph of this petition is set forth; that the defendant was interested therein as therein stated, and so much of said first paragraph as refers to the organization of said company and the connection of said Smith therewith is here made part of this cause of action as if here again written out in full; and plaintiff says that in the month of February and March, 1880, the defendant requested said John H. Bolles to purchase and subscribe for 2,000 shares of the stock of said Irene Mill and Mining Company, and to induce the purchase thereof by the said John H. Bolles the defendant represented to said John H. Bolles that he had heard of the Irene mine from J. W. Haskins; that to satisfy himself he had visited the mine, which was near
21 Globe, in Arizona Territory; that he visited it for the purpose of ascertaining if what he had so heard as to its value and condition was true; that he had found the mine a very valuable one; that there was a large amount, to wit, several hundred tons, taken out and on the dump; that the shaft was more than one hundred feet deep; that the ore then taken out from the shaft did not any of it run under $100 of silver to the ton; that he knew the ore was milling ore; that the cost of milling and mining would be about $35 per ton; that there was enough ore on the dump to pay for a mill and all expenses, so that in any event there would be no loss; that the country around the mining location produced large quantities of paying ore; that if this company had no mine the use of the mill in that section with the pay ores produced and found there would make it a paying enterprise on that basis alone. He spoke of the crude methods of working mines in that neighborhood by *arrastre* and in which all the bullion could not be obtained; that the Mexicans, notwithstanding this loss, made large profits; that Globe was a new camp, but few people there, and would soon have a great growth; that he had put money in himself, a considerable sum, and was not taking any risk in doing so; that the vein in said Irene mine was 20 to 30 feet wide and widened as it went down; that the shaft was 100 feet deep; that he had been through the property, the mine and shaft, and seen the ores; that he had made a thorough examination and satisfied himself of the facts he had stated; that he selected the ores indiscriminately through the shaft in order to determine the value; that the average was considerably over $100 per ton and none running under that amount; that there was no mill there; that the ore he had assayed he
22 took from the shaft; that he had enough money, with what said John H. and the plaintiff subscribed or took, to carry through the enterprise. Plaintiff says that said John H. Bolles

believed said statements and representations, and, believing them and relying thereon and being induced thereby, agreed with said Smith to buy and did buy 2,000 shares of said stock at the special instance and request of said defendant and paid for the same the sum of $3,000 to one H. J. Davis, being the sum so agreed upon with defendant; that said defendant, when he so made said representations, knew them to be false and untrue; that they were in fact each false and untrue except that said Smith had been to see said property and spoke from or claimed to speak from personal knowledge and was made with the intention of cheating and defrauding the said J. H. Bolles; that the said J. H. Bolles was thereby cheated and defrauded out of his said money; that if the said property had been as described by defendant the said stock would have been worth at least $10 per share, and that, by reason of the premises, he was in fact damaged to the extent of $6,000, and thereby an action accrued to said J. H. Bolles to have and demand of said defendant his damages as aforesaid; that afterward and before the commencement of this suit the said J. H. Bolles sold, assigned, and transferred to this plaintiff his said claims and damages against the defendant, whereby plaintiff has become and is the owner thereof and is entitled to recover of defendant his damages aforesaid, to wit, said sum of $6,000.

No. 3. The plaintiff further says that L. W. Marstellar is a citizen of the State of New York; that the Irene Mill and Mining Company and its supposed property was organized and located as in the
23 first paragraph of this petition set forth; that the defendant was interested therein as stated, and so much of said first paragraph as refers to the organization of said company, its location, and the connection of said Smith therewith is here made part of this cause of action as if here again written out in full; and the plaintiff says in and during the month of June, 1880, the defendant requested said L. W. Marsteller to purchase and subscribe for 800 shares of the stock of said Irene Mill and Mining Company, and, to induce the purchase thereof by the said L. W. Marstellar, the defendant represented to said Marstellar that he had visited the mine; that — had found it much richer than he expected; that he considered it one of the best mining properties in Arizona; that he had put into it $1,500 in cash and a house and lot in New York worth from $26,000 to $30,000, and that said Marstellar could see from that what confidence he had in the investment; that the quality of the ore was constantly improving in the shaft; that — ought to have a 20-stamp mill instead of a 10-stamp mill; that Globe was one of the best mining districts in the country; that there was enough ore on the dump to run the mill for some time, averaging from 40 to $200 per ton; that there was plenty of ore from other mines to run the mill at a large profit; that the shaft was down 200 feet; that he had seen it and examined the quality of the ore in the mine, and that there *was* large quantities of paying ore in sight in the shaft. Plaintiff says that said L. W. Marstellar believed said statements and representations of defendant, and, believing them and relying thereon and being induced thereby, agreed to and did purchase from

said Smith 800 shares of said stock at and for $2 per share, which he then and there paid to said Smith, to wit, $1,600.

24 That said representations so made by said Smith were each and all of them false and untrue, except that he had visited the property and examined it for himself; that said Smith, when he made said representations, knew them to be false and untrue and were made with the intention of cheating and defrauding the said Marstellar out of his said money and inducing him to buy a worthless article or stock, and that said stock was at the time wholly worthless; that if said property had been as described by the defendant said stock would have been worth at least $10 per share, and that by reason of the premises he was in fact damaged to the extent of $2,000, and thereby an action accrued to said L. H. Marsteller to have and demand of said defendant his damages aforesaid; that afterwards and before the commencement of this suit the said L. H. Marstellar sold, assigned, and transferred to this plaintiff his said claim and damages against the defendant, whereby plaintiff has become and is the owner thereof and is entitled to recover of defendant the damages aforesaid, to wit, said sum of $2,000.

No. 4. The plaintiff further says that Mrs. Mary Manchester is a citizen of the State of New York; that the Irene Mill and Mining Company and its supposed property was organized and located as in the first paragraph of this petition set forth; that the defendant was interested therein as therein stated, and so much of said first paragraph as refers to the organization of said company, the location of the property, and the connection of said Smith therewith is here made part of this cause of action *is* if here again written out in full; and plaintiff says that some time in the month of June, 1880, the defendant requested said Mary Manchester to purchase and buy of him 225 shares of the capital stock of the Irene Mill and Mining Company, and to induce the purchase thereof by the said

25 Mary Manchester the defendant falsely represented to her that he had been to and in the mine; that there were then 200 tons or more that had been taken out of the mine assaying or worth $200 per ton; that the deeper they went with the shaft the richer was the ore; that they had bought a mill and would have it running in sixty days; that after getting the mill in running order the ore was so rich they would be able to make from 20 to 25 cents dividend on each share within ninety days; that she would be able to buy back her stock with the dividend inside of six months; that he had been down in the shaft and knew what he was representing about the mine; that he had sold his house and lot on 34th street, a valuable property, for $30,000 and had invested every dollar of it in the mine; that he would not sell his stock at any price; that defendant, when he so made said representations, knew them to be false and untrue; that they were in fact false and untrue, except the statement that he had visited said property and claimed to speak from personal knowledge; that defendant made said false representations with intent thereby to cheat and defraud said Mary Manchester, and she was by reason thereof deceived, cheated, and defrauded; that if the said property had been as described by defendant

the said stock would have been worth at least $10 per share, and that by reason of the premises she was in fact damaged to the extent of $1,500, and thereby an action accrued to said Mary Manchester to have and demand of said defendant her damages aforesaid; that afterwards and before the commencement of this action the said Mary Manchester sold, assigned, and transferred to this plaintiff her said claim and damages against the defendant, whereby plaintiff has become and is the owner thereof and is entitled to recover of
26 defendant his damages aforesaid, to wit, said sum of $1,500.

No. 5. The plaintiff further says that John Van Gassbeck is a citizen of the State of New York; that the Irene Mill and Mining Company and its supposed property was organized and located as in the first paragraph of this petition set forth; that the defendant was interested therein and connected therewith as in said first paragraph mentioned, and so much of said first cause of action as refers to the organization of said company, the location of the property, and the connection of said Smith therewith is here made part of this cause of action as if here again written out in full; and plaintiff says that some time in the months of August and September, 1880, the defendant requested said John Van Gassbeck to purchase and subscribe for 2,500 shares of the stock of said Irene Mill and Mining Company, and to induce the said Van Gassbeck to make the purchase thereof the defendant falsely represented to said Van Gassbeck that he knew a very valuable mining stock and believed if he, said Van Gassbeck, was as familiar with it as he, the said Smith, he would not hesitate to go into it. He, said Smith, represented to said Van Gassbeck — had been down into the mine twice; that he had taken ore from different parts of it and had it assayed, and it run from $175 to $250 a ton in bullion, and, to show his faith in the mine, said he had sold a house owned by him in the city of New York for $30,000 and put every dollar of it in that mine; that they had a mill on the property that would be running in ninety days; that they had at least 250 tons of paying ore on the dump at the mine that could be milled and would pay all expenses; that he, said Smith, knew of nothing into which said Van Gassbeck could put his money that would yield so quick returns; that,
27 believing said representations to be true and relying upon them, said Van Gassbeck, upon the faith thereof, in the months — August and September, 1880, bought of defendant and at his special instance and request 2,500 shares of said stock at and for the price of $2 per share, making $5,000, which he then and there paid to defendant. Plaintiff says that each and all of said representations were false and untrue and were known to defendant to be false and untrue and were made with the intention of cheating and defrauding said Van Gassbeck; that said stock and property were wholly worthless; that said Van Gassbeck was in fact deceived, cheated, and defrauded by reason of the premises out of his said money; that if the said property had been as described by defendant the said stock would have been worth at least $10 per share, and that by reason of the premises he was in fact damaged to the extent of $10,000, and thereby an action accrued to said Van Gassbeck to

have and demand of said defendant his damages as aforesaid; that afterwards and before the commencement of this action the said John Van Gassbeck sold, assigned, and transferred to this plaintiff his said claim and damage against the defendant, whereby plaintiff has become and is the owner thereof and is entitled to recover of defendant his damages aforesaid, to wit, said sum of $10,000.

Plaintiff says that the aggregate of said damages amounts to $60,500, and alleges that by reason of the premises he ought to recover the sum from defendant.

Wherefore he prays judgment against defendant for $60,500, his damages aforesaid.

By ESTEP, DICKEY AND SQUIRE,
His Att'ys.

THE STATE OF OHIO, } ss:
Cuyahoga County, }

Richard J. Bolles, being sworn, says that the facts in the foregoing amended petition set forth are true, as he believes.

RICHARD J. BOLLES.

Sworn to and subscribed by said Richard J. Bolles before me and in my presence March 3rd, 1886.

J. H. DEMPSEY, [SEAL.]
Notary Public.

And afterwards, to wit, on the 2nd day of March, 1886, the following answer to amended petition was filed in this cause in said court, viz:

Answer to Amended Petition.

In United States Circuit Court, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Now comes the said defendant, Lewis W. Smith, and for answer to the amended petition of the plaintiff says that he admits the allegations of the residence of the parties and the incorporation and the organization of said Irene Company, and that he denies all and every other allegation in said amended petition contained.

2. And, further answering the said amended petition and as a defense to said first cause of action therein, says that the right of action in said first cause of action set forth accrued to said plaintiff more than four years before the filing of said amended petition and the commencement of any action thereon.

3. And, further answering the said petition and as a defense to said second cause of action therein, says that the right of action in said second cause of action set forth accrued to said plaintiff
29 or to his assignor more than four years before the filing of said amended petition and the commencement of any action thereon.

4. And, further answering said petition and as a defense to said third cause of action in said petition, says that the right of action in said third cause of action set forth accrued to said plaintiff or to his assignor more than four years before the filing of said amended petition and the commencement of any action thereon.

5. And, further answering said petition and as a defense to said fourth cause of action in said petition, says that the right of action in said fourth cause of action set forth accrued to said plaintiff or to his assignor more than four years before the filing of said amended petition and the commencement of any action thereon.

6. And, further answering said petition and as a defense to said fifth cause of action in said petition, says that the right of action in said fifth cause of action set forth accrued to said plaintiff or to his assignor more than four years before the filing of said amended petition and the commencement of any action thereon.

Whereupon, having fully answered, this defendant asks to be dismissed with his costs.

NORTHWAY & FITCH AND
BOYNTON AND HALL,
Att'ys for Def'ts.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Lewis W. Smith, being first duly sworn, on oath says that he is the defendant above named, and that all of the facts stated and allegations in his foregoing answer are, as he believes, true.

L. W. SMITH.

30 Sworn to before me and signed in my presence this 2nd day of March, A. D. 1886.

A. J. RICKS, *Clerk.*

And afterwards, to wit, on Wednesday, March 3rd, 1886, and on each of the days following, being days of the February term, 1886, of said court—present, Honorable Martin Welker, district judge—the following proceedings were had, viz:

Trial of Case.

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and the trial of this case proceeded. The plaintiff's testimony was continued but not concluded, when the further trial of this case was postponed until to-morrow.

THURSDAY, *March 4th*, 1886.

This day again came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and the trial of this case proceeded. Plaintiff's testimony was continued but not concluded, when the further trial of this case was postponed until to-morrow.

FRIDAY, *March 5th.*

Plaintiff's testimony closed and defendant's testimony was begun but not concluded.

SATURDAY, *March 6th.*

Defendant's testimony continued but not concluded.

And afterwards, to wit, on the 8th day of March, 1886, the following reply was filed in this cause in said court, viz:

U. S. Circuit Court.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

31 The plaintiff, for reply to the several defences by the defendant set forth in his answer to the amended petition of plaintiff filed in this action, and which several defences are in said answer numbered, respectively, 2, 3, 4, 5, and 6, *and* denies each and all of the allegations therein contained. He denies that this action is subject to the limitation pleaded in said answer, to wit, the several causes of defense aforesaid, and avers that each of the contracts or causes of action in the said amended petition set forth, and to which each of said paragraphs numbered 2, 3, 4, 5, and 6 purport to be made, were made and accrued in the State of New York and are controlled by the laws of said State, and he therefore denies that this action is subject to the limitations in said paragraphs of said answer mentioned, and this he is ready to verify, &c.

By ESTEP, DICKEY & SQUIRE,
Pl'ff's Att'ys.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

R. J. Bolles, being duly sworn, says the facts in the foregoing reply set forth are true, as he believes.

RICHARD J. BOLLES.

Sworn to and subscribed by said R. J. Bolles before me and in my presence March 8th, 1886.

J. H. DEMPSEY, [SEAL.]
Notary Public.

And afterwards, to wit, on Monday, March 8th, 1886, and on each of the days following, being days of the February term, 1886, of said court, before the Honorable Martin Welker, district judge, the following proceedings were had in this cause in said court, viz:

Defendant's testimony continued but not concluded.

TUESDAY, *March 9th.*

Defendant's testimony concluded, when further trial of this case was postponed until to-morrow.

32 WEDNESDAY, *March 10th.*

The testimony was closed and the arguments of counsel were begun but not concluded.

THURSDAY, *March 11th.*

Arguments continued but not concluded.

FRIDAY, *March 12th.*

Arguments of counsel were concluded, and the jury, having first received their instructions from the court, retired for deliberation in charge of the marshal; but, not having yet agreed upon a verdict when the hour for adjournment arrived, the further consideration of this case was postponed until to-morrow.

SATURDAY, *March 13th.*

And said jury not having yet agreed upon a verdict when the hour for adjournment arrived, the further consideration of this case was postponed until to-morrow.

MONDAY, *March 15th.*

This day came the parties, by their counsel, and came also the jury as heretofore impanelled and sworn herein, and said jury, having agreed upon a verdict, come into court and for verdict say:

Verdict.

"We, the jury in this case, being duly impanelled and sworn, do find for the plaintiff, and we do assess his damages *to* the sum of eighty-one hundred and forty dollars.

J. P. COWAN, *Foreman.*"

And afterwards, to wit, on the 16th day of March, 1886, the following motion was filed in this cause in said court, viz:

Defendant's Motion for a New Trial.

In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Motion for new trial.

33 Now comes the defendant, Lewis W. Smith, and moves the court to set aside the verdict rendered in this cause and grant him a new trial for the following reasons:

1st. That the court erred in admitting testimony offered by the plaintiff to which the defendant at the time objected and excepted.

2nd. That the court erred in excluding from the consideration of the jury testimony offered by the defendant, to which the defendant at the time excepted.

3rd. That the court erred on the trial of the case in the charge given to the jury, to which the defendant excepted.

4th. That the court erred on the trial of the case in refusing to charge the jury as requested by the defendant, to which the defendant at the time excepted.

5th. The verdict given in the case is against and contrary to the weight of the evidence and the law of the case.

6th. The damages given by the jury are excessive.

NORTHWAY & FITCH AND
BOYNTON & HALL,
Attorneys for Def't.

And afterwards, to wit, on the 17th day of March, 1886, the following motion was filed in this cause in said court, viz:

Plaintiff's Motion for a New Trial.

United States Circuit Court, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

And now comes the plaintiff and moves the court for a new trial, and for causes says—

1st. The verdict is against the law and against the law as charged by the court.

2nd. The verdict is contrary to and against the evidence.

34 3rd. The court erred in admitting testimony offered by defendant and objected to by the plaintiff.

4th. The court erred in failing to explain to the jury the force and effect of the testimony so admitted as requested and promised by the court.

5th. The court erred in its charge to the jury on the following subjects: What was said about the assignment of claims sued upon in the 2nd, 3rd, 4th, and 5th causes of action, in refusing to charge as requested by the plaintiff, and in many other respects.

ESTEP, DICKEY AND SQUIRE,
Pl'ff's Attorneys.

And afterwards, to wit, on the 27th day of March, A. D. 1886, the following amendment was filed in this cause in said court, viz:

Amendment to Motion for New Trial.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Now comes the defendant, Lewis W. Smith, and, by leave of court, files this his amendment to his motion for a new trial, and in addi-

tion to the reasons in his original motion stated and as a further reason why a new trial should be granted him alleges, 1st, that during the trial of the case there was gross misconduct on the part of the plaintiff, through his counsel, to wit, that E. J. Estep, one of the attorneys for the plaintiff, in the closing argument to the jury in behalf of the plaintiff, used and addressed to the jury the following language, to wit: "Gibford," meaning —— Gibford, "died of grief
35 because of the fraud perpetrated upon him by this man, Smith, and he is as much of a murderer as though he had killed him. He," meaning Smith, "sold him," meaning Gibford, "the stock, and he," meaning Gibford, "is dead. That is certain, and, I assume, that was the cause." The language above set forth had no reference to any evidence offered in the case and was merely a voluntary accusation against the defendant to prejudice the jury, to all of which and to the use of the language of the counsel for plaintiff as above given the counsel for defendant objected and then and there excepted.

Secondly. The defendant alleges that there was irregularity in the proceedings of the court or abuse of discretion on its part by which the defendant was prevented from having a fair trial, in that the court permitted counsel for the plaintiff to address to the jury the language above set forth and in the refusal to withdraw the same from the consideration of the jury, as requested by counsel for defendant, and to all of which exceptions were taken at the time by defendant.

NORTHWAY & FITCH AND
BOYNTON & HALE,
Att'ys for Defendant.

And afterwards, to wit, on the 27th day of March, 1886, the following exception to amendment was filed in this cause in said court, viz:

Exception to Amendment.

Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

The plaintiff, by his counsel, protests against the application of defendant to amend his motion for new trial on March 27th, 1886, by adding alleged matter well known to the defendant at the time
36 of filing the original motion; that the motion as then amended was not filed within three days after verdict rendered, as required by law, and to the granting of leave by the court, the plaintiff, by his counsel, at the time excepted.

R. J. BOLLES,
By ESTEP, DICKEY & SQUIRE,
His Att'ys.

And afterwards, to wit, on Saturday, March 27th, 1886, being a day of the February term, A. D. 1886, of said court, before the Honorable Martin Welker, district judge, the following judgment was rendered, viz:

Judgment.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

This day came the parties, by their counsel, and came the defendant, and upon his application he has leave to amend his motion to set aside the verdict heretofore rendered herein and for a new trial, to which order plaintiff excepts, and thereupon, upon consideration, it is ordered that said motion as amended be overruled; and thereupon came the plaintiff and withdrew his motion to set aside the verdict as hereinbefore rendered and for a new trial, and, upon motion of plaintiff, it is ordered and considered that the said plaintiff, Richard J. Bolles, have and recover from the defendant, Lewis W. Smith, the sum of eight thousand one hundred and forty dollars, the damages so as aforesaid assessed by the jury, together with the costs of suit, to be taxed at $—, for which execution may issue; and thereupon came the defendant and tendered his bill of exceptions to the court, which is signed and sealed and ordered to be made a part of the record in this case.

37 And afterwards, to wit, on the 27th day of March, A. D. 1886, the following bill of exceptions was filed in this cause in said court, viz:

Bill of Exceptions.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Be it remembered that on the trial of this cause, at the February term, A. D. 1886, of said court, before the Hon. Martin Welker, judge of said court, the plaintiff, to maintain the issues on his part, offered testimony tending to prove all the material allegations of his petition, and, among others, the plaintiff was called and examined as a witness in his own behalf, who stated that prior to March, 1880, he resided in the city of New York; that for several years prior to 1880 his business had been a stock broker; that he had known the defendant since 1876 or 1877, and had occasionally met him in the city of New York during their acquaintance and had conversations with him about his property. Counsel for the plaintiff then asked the witness the following question:

"How shortly next before the making of the contract did he say anything about his business?"

To which question the defendant, by his counsel, objected; but the court overruled the objection and directed the witness to answer the

question; to which ruling of the court the defendant then and there excepted. The witness answered:

"At the time of the purchase of the stock, or about that time, when we were talking it over, he told me his business more than at any other time."

38 Counsel for the plaintiff then put to the witness the following question:

"Tell us what he told you."

To which counsel for defendant objected, but the court overruled the objection; to which the defendant excepted, and the witness answered:

"He told me about the history of his connection with the millinery business in New York principally, and he had drawn money out at first as he made it there and invested it in Ashtabula in real estate. The other partners had spent their money, and when the firm failed he had his money well saved up; that his investments in Ashtabula had paid very largely; that he had houses and stores, and I think he told me an opera-house, or something of that kind, in Ashtabula. He estimated himself worth $200,000, he told me."

To the answer as given the defendant then and there objected, but the court permitted said answer to go to the jury; to all of which the defendant excepted.

Witness then further stated that said conversation took place at a house owned by the defendant, on West 34th street, in the city of New York.

The plaintiff also called as a witness one David M. Strong, who testified that he resided in Ashtabula, Ohio, and had known Mr. Smith, the defendant, for many years.

Counsel for plaintiff then put to the witness the following question:

Question. I will inquire if in the winter of 1880—and by that I mean December, January, and February—you purchased of Mr. Smith or through Mr. Smith some Irene Mine and Milling Company stock?"

To which the defendant objected, but the court overruled the objection and permitted the witness to answer the question; to which ruling of the court the defendant then and there excepted. The witness answered:

"I did, sir." The following questions were also put to this witness, and the witness answered the same as given below; to
39 all of which and to each question when put and to each answer when given the defendant objected, but the court overruled the objection, and the defendant at the time excepted:

Q. Will you tell the court and jury about what time it was?

A. I think it was in the winter of 1881, if I am mistaken not. I may be mistaken.

Q. You are mistaken a year about it.

A. It was not far from that. It was in the winter time, I recollect, or shortly after he came back *to* Arizona.

Q. The first time or second time?

A. Well, I do not know that I could state that positively, sir.

Q. It appears that he went to Arizona in the fall of 1879 and again in the spring of 1880. Have you got your certificates of stock with you?

A. No, sir; I have not.

Q. Well, you say you bought it shortly after he came back from Arizona. Is that right?

A. Yes, sir; it might have been within a month and it might have been a month after.

Q. And when did you have your interview with Mr. Smith?

A. In his store, in Ashtabula.

Q. How did you come to go to his store to have an interview with him?

A. I think I was going by his store, and he was either just going into his door or standing in his store door, and asked me in; walked back to his desk, at the back end of the store, and sat down, and he made these statements in regard to the——

Q. I am going to ask you what they were in a moment. When you got in there did you have a conversation with Mr. Smith about the Irene mine and his visit to it?

A. Yes, sir.

Q. I want you to tell what representations Mr. Smith then made to you about this Irene mine and that property.

A. I wish the court to understand that I said in 1880 or 1881 that I bought the stock; I have forgotten which year it was.
40 Mr. Smith says to me, You and I have always been great friends; now, I have got a good thing out there. I have put in my property in New York, so and so; I want to let you have some. I told him if he had done what he said he had done, knowing him to be a business man—I do not know that I told him he was a business man, but knowing him to be a business man that had *been* prospered in all his undertakings—I had confidence in him, and he said that he had put this in there. I says to him, If you have put that much into it I ain't afraid to put in a little. Therefore I took $6,000 in it.

Q. What, if anything, did he say about the shaft or the depth of it?

A. He said it was 150 feet deep; he had been down in it to the bottom; showed me some specimens. He said they will go from $100 to $180 and maybe $200 to the ton; there were six or seven hundred tons.

Q. What did he say about the quantity of ore around the mouth of the mine, on the dump?

A. I think he said from four to five or six hundred tons, and it would go from $100 to $180 per ton. He said one side of the mine

was right down on the rock and the other three sides were just as good as the specimens that he showed me. I asked him if he would give me one of those specimens. He said, No; they were not as big as he would like to give me, and he had some big ones he would like to give me, but I have never seen the big ones nor the little ones since. I do not know that I have ever spoken to him but once or twice since. He always scorns me on the street every time he sees me.

Q. What did Mr. Smith then tell you he had put into it himself?

A. He said he had put in his house and lot in New York.

Q. Did he make any statement as to the amount he had put it in for, the value of the house and lot that he put in?

A. I think he called it $30,000 or upwards.

41 Q. Do you remember any other statement he made to you at the time except those you have stated, about the depth of the shaft and the amount on the dump, and that he put his house into it?

A. Why, he spoke about a mill they wanted to start. He said the mill would pay; make a good investment. I believe that is the way he worded it, or would be a good investment, if they never milled a pound of their own ore, for taking in from other people's mines. He said it was the only mill there was there, and some advantages it had over any other site that they would get.

Q. How long after that interview with Mr. Smith in the store until you paid your money and got your stock?

A. I could not tell. My son did the business; he could tell.

The responsibility of Mr. Smith for the sale of the stock to Mr. Strong was in no way involved in this suit, and the transaction with Mr. Strong, the witness, was wholly independent of any of the transactions involved in this suit; but the court admitted this testimony, not for the purpose of proving representations made by defendant to the plaintiff Bolles or his assignors, but as tending to show, if representations made to plaintiff by the defendant were proven and were false and fraudulent, the interest and purpose of defendant to defraud the plaintiff.

The plaintiff also called and had sworn as a witness C. W. Jacques, who testified that he was a resident of Ashtabula county, Ohio, and had known Mr. Smith for several years; that, in the spring of 1880, he purchased of or through Mr. Smith stock in the Irene Mine and Milling Company; and thereupon plaintiff's counsel put to the witness the following question:

42 State what representations Mr. Smith made to you on the occasion of your first purchase of this stock at and before the time you bought it. To which the defendant at the time objected, but the court overruled the objection and permitted the witness to answer the question; to which the defendant at the time excepted. Witness answered: I was renting a house from Mr. Smith; living in one of his houses. He built a row of four brick houses, and as soon as the second one was finished I moved into it

and lived there while he was completing the third and fourth in the row, so that we were brought into very close contact with Mr. Smith. This, I think, was in the spring of 1879; that is my recollection of it; and along during the summer or late in the fall, some time anyhow during 1879, Mr. Smith went West—went out into the Western country—and after his return from his Western trip I dropped into his store to welcome him back home and talk matters over with him about his Western trip, &c., and he told me of the wonderful country out there and how entirely undeveloped it was, so far as any machinery of any kind out there for milling any of ores that they were taking out; told me about the wonderful amount of ore that was there and gave me a description of one of their primitive machines for milling the ore; spoke about a mule driving around in a circle and crushing up the ore just as you would crush up dirt in making brick, and he spoke further about an idea that he had in his head of putting of some machinery there for the purpose of milling this ore; spoke of the inexhaustible supply of ores at different points there, and I asked him about the probable cost of such a machine, and he thought that a company of $50,000 could put up a machine of that kind. That is about the substance of the conversation. That was repeated at different times and dwelt upon later in the winter. The defendant objected also to
43 this answer as given, but the court overruled the objection and permitted the answer to go to the jury; to which the defendant, by his counsel, excepted. The witness further stated that he had a conversation with the defendant in May or June, 1880, and counsel then put to him the following question: State what that conversation was. To which the defendant objected, but the court overruled the objection; to which ruling of the court the defendant excepted. Witness answered: "Of course, Mr. Smith may have told me hurriedly about the mine before he went to Globe the second time, but I think very probably that he did not tell me very much about it, because he was in a great hurry, expecting to start the next day or within a day or two for Globe; but when he got back from there, after he had been out there and seen to the shipping of the mill, then, of course, we talked things over very thoroughly. He told me that there had been a mine discovered there; that Mr. Haskin, a practical miner, a man who had been for ten years in that business, locating mines, had located this mine; that Mr. Haskin was to have forty thousand shares of the stock, but that the stock was not to be turned over to Mr. Haskin until the mill mine was completed and was turning out dividends, so that we ran no risk on that score at all, and he told me of the shaft going down. He simply said that there was a shaft in the mine that ran down, and they were building tunnel to connect with it."

Same objection and exception taken. Counsel then put to him the following question: "What did he say about the depth of the shaft?" To which objection was raised; overruled and exception taken. The witness answered:

"I could not say. I could not remember as to the number of feet that he gave. My memory is not perfect on that. I

have only got a general idea of it, of course—that the
44 shaft was to run down and the tunnel was to run in and connect with it. He told me about the railroad track that was running in there, and how the tunnel had enough of an elevation so that the cars would run down when they were loaded, and everything in the most perfect and approved manner." To which answer the defendant objected. The objection was overruled and exception taken, and counsel put to the witness the further question: "What, if anything, did he say about the quantity of ore on hand or in sight?" To which defendant objected. His objection was overruled and exception taken. The witness answered: "He said that there were large quantities of ore that had been taken out from the shaft, and also that where they were working at the tunnel they were constantly bringing out ore at the mouth of the tunnel. I could not say as to the amount of ore at the shaft or the tunnel, either. He told me that he had such implicit faith in the thing that he had disposed of his New York house and lot, and had put his own money in there—the proceeds of that sale. He gave no specimens that he had taken out of the mine himself." To which answer defendant objected. Objection overruled and exception taken. The court admitted this testimony only as tending to show guilty and fraudulent purpose on behalf of the defendant in making similar representations to the plaintiff.

To further maintain the issues on his part the plaintiff, having given other oral evidence tending to show ownership of claim, offered in evidence the written assignment made by John H. Bolles to the plaintiff; to the introduction of which in evidence the defendant, by his counsel, objected, but the court overruled the objection; to which ruling of the court the defendant excepted. Said assignment is in words and figures as follows:

45 SAN FRANCISCO, *Feb.* 19, 1884.

For the sum of one (1) dollar and other valuable considerations, receipt of which is hereby acknowledged, I, J. H. Bolles, of the city of San Francisco, State of California, hereby assign, set over, demise, and release forever unto Richard J. Bolles, of the city of New York, State of New York, all claims, rights, actions, causes of action, suits, dues, interest, sums of money, covenants, contracts, controversies, agreements, variances, damages, and demands whatsoever which I ever had or now have against L. W. Smith, of the city of Ashtabula, State of Ohio, growing out of my right, title, and interest in and subscription to the shares of the capital stock of the Irene Mill and Mining Company, a corporation duly incorporated under the laws of the State of New York and doing business near Globe, Arizona Territory, and growing out of any business relations which the said L. W. Smith had with the said Irene Mill and Mining Company; and I also, for the consideration above named, hereby assign, set over, demise, and release unto the said Richard J. Bolles all my right, title, and interest in and to any and all shares of the capital

stock of the said Irene Mill and Mining Company which I now have or may be entitled to.

J. H. BOLLES. [SEAL.]

Due notarial acknowledgment and certificate.

And thereupon the defendant offered and gave evidence to the jury tending to maintain and establish the issues of the case in his behalf, and also gave testimony tending to establish the fact that the defendant Smith had nothing whatever to do with the organization and formation of the Irene Mine and Milling Company,
46 and had no knowledge of its existence until long after such organization; and thereupon, after the argument of counsel, the court instructed the jury as to the law applicable to the issues of the case, and among other things stated and charged the jury as follows:

The defendant Smith was in some way identified with the organization of the company (referring to the Irene Mine and Milling Company); to which statement and charge as given by the court the defendant then and there excepted.

As to the law by which the jury were to be governed in the assessment of damages under the issues made in the case the court charged the jury as follows:

"The measure of recovery is generally the difference between the contract price and the reasonable market value. If the property had been as represented to be or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant and as may be shown in the evidence before you." To which statement of the law and charge as given by the court the defendant then and there excepted.

Whereupon the defendant requested the court to charge the jury as follows: "If the jury find from the evidence that John Bowles discovered the fraud alleged to have been perpetrated upon him by the defendant as set out in the second cause of action, more than four years prior to February 1st, 1886, no recovery can be had in this action on the alleged second cause of action stated in the amended petition, as the right of action thereon would in such case be barred by the statute;" which the court refused to do; to which refusal the defendant then and there excepted.

The defendant also requested the following charge, to wit:
47 "The writtem instrument, marked Exhibit '—,' from John Bolles to Richard Bolles, does not assign or transfer the second cause of action stated in the amended petition of the plaintiff to the said Richard Bolles;" which the court refused to give, and to which refusal the defendant then and there excepted.

Whereupon the jury found and returned a verdict for the plaintiff in the sum of $—.

The defendant, after verdict and before judgment, having filed his motion for a new trial and amendment to said motion, as will appear from the record, to sustain the same, offered and read in evidence to the court the following affidavits, to wit:

Affidavit.

STATE OF OHIO, *Ashtabula County*, } ss:

In Circuit Court of United States of America, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS F. SMITH, Defendant.

Stephen A. Northway, being first duly sworn, says that he was present as one of counsel for defendant during the trial of the above-entitled cause in said court; that the closing argument on part of the plaintiff was made by E. J. Estep, Esq.; that affiant was present and heard all that was said there by him; that in his argument said Estep addressed to the jury substantially the following language, to wit: "Gifford," meaning the Gifford who wrote the letters attached to the deposition of plaintiff read in evidence on the trial of said action, "died of grief because of the fraud perpetrated upon him by this man Smith, and he is as much of a murderer as though he had killed him."

Counsel for defendant at this point interrupted Mr. Estep
48 and called the attention of the court to the language used by him. The court simply said to Mr. Estep, "You must not say so," but said nothing to the jury whatever; and after the interruption Mr. Estep, continuing to address the jury, added: "He," meaning defendant, "sold him," meaning Gifford, "the stock, and he is dead; that is certain, and I assume that was the cause." The court did not stop counsel for plaintiff or caution the jury as to the effect of the language used, and exceptions were noted by counsel for the defendant. Affiant further says that counsel for plaintiff neither retracted nor in any way withdrew from the jury the above statement or any part thereof.

S. A. NORTHWAY.

Sworn to before me and subscribed in my presence this 27th day of March, 1886.

O. J. MATTHEWS, [SEAL.]
Notary Public.

Also—

Affidavit.

STATE OF OHIO, *Cuyahoga County*, } ss:

In Circuit Court of the United States of America, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

W. W. Boynton, being first duly sworn, says that he was present as one of the counsel for defendant during the trial of the above-en-

titled case in said court; that the closing argument on part of the plaintiff was made by E. J. Estep, Esq.; that affiant was present and heard all that was said by him; that in his argument said Estep addressed to the jury the following language, to wit: "Gifford," meaning —— Gifford, "died of grief because of the fraud perpetrated upon him by this man Smith, and he is as much of a murderer as though he had killed him." At this point affiant
49 interrupted Mr. Estep and called the attention of the court to the language used by him. The court simply said to Mr. Estep, "You must not say so," but said nothing to the jury whatever; and after the interruption Mr. Estep, continuing to address the jury, added: "He," meaning defendant, "sold him," meaning Gifford, "the stock, and he is dead; that is certain, and I assume that was the cause." The court did not stop counsel for the plaintiff or caution the jury as to the effect of the language used, and exceptions were noted by counsel for defendant. Affiant further says that counsel for plaintiff neither retracted nor in any way withdrew the above statement nor any part thereof from the jury.

W. W. BOYNTON.

Sworn to before me and in my presence subscribed this March 27th, 1886.

NORTON T. HORR, [SEAL.]
Notary Public.

Also—

Affidavit.

STATE OF OHIO, *Cuyahoga County,* } *ss:*

In Circuit Court of the United States, Northern District of Ohio, Eastern Division.

RICHARD J. BOLLES, Plaintiff, *vs.* LEWIS W. SMITH, Defendant.

Thomas Fricker, being first duly sworn, says that he was present during the trial of the above-entitled cause in said court; that the closing argument on part of the plaintiff was made by E. J. Estep, Esq.; that affiant was present and heard all that was said by him; that in his argument said Estep addressed to the jury the following language, to wit: "Gifford," meaning —— Gifford, "died of grief because of the fraud perpetrated upon him by this man Smith, and he is as much of a murderer as though he
50 had killed him." Counsel for defendant at this point interrupted Mr. Estep and called the attention of the court to the language used by him. The court simply said to Mr. Estep, "You must not say so," but said nothing to the jury whatever; and *before* the interruption Mr. Estep, continuing to address the jury, added: "He," meaning defendant, "sold him," meaning Gifford, "the stock, and he is dead; that is certain, and I assume that was the cause." The court did not stop counsel or caution the jury as to the effect of the language used, and exceptions were noted by counsel for defend-

ant. Affiant further says that counsel for plaintiff did not in any way withdraw the above statement from the jury or retract the same or any part thereof.

THOS. FRICKER.

Sworn to before me and in my presence subscribed March 27th, 1886.

NORTON T. HORR, [SEAL.]
Notary Public.

The plaintiff then read in evidence the affidavit of E. J. Estep, which was in the following language, to wit:

Affidavit.

Circuit Court N. D. of Ohio, Eastern D.

RICHARD J. BOLLES, Pl'ff, *vs.* LEWIS W. SMITH, Def't.

E. J. Estep, being sworn, says that the testimony on the trial of the above action tended to show that the defendant had been for many years a friend and acquaintance of —— Gibford, a dry-goods salesman in the house of of Halstead, Haine & Co., N. Y.; that said Gifford, through the influence of defendant, had bought and induced others to buy stock of the Irene Mill and Mining Company; that letters were introduced from defendant to said Gibford
51 recommending the stock very highly—extravagantly so—and requesting that such letters might be shown to his, Gibford's, friends, and that Gibford was dead; that the letters so read were obtained from his widow; that counsel for defendant on several occasions during argument to the jury took occasion to charge plaintiff with violating the grave of Gibford to bring these letters to light by imposing upon his widow, and appealed to the jury to condemn such imaginary misconduct by their verdict; and affiant admits that, by way of reply to these remarks, he drew on his imagination a little by depicting his death of grief in consequence of the many lies he was induced by the defendant to represent to his friends and the consequent ruin of clerks and salesmen who invested their all in this worthless stock. He admits that he was the counsel for plaintiff who made the closing argument to the jury. He denies that he used the language written in the motion and affidavits filed in manner and form set forth. He denies that he used the word "murderer." He admits that he was proceeding to say and did say that Gibford died of grief because of his connection in manner aforesaid with the defendant and the innocent imposition practised upon his friends; that counsel for defendant here interposed and called the attention of the court to the remarks. He says the court did then say to him that such remarks were without the record, and did say to the jury that they should give no consideration to them, and that he then continued substantially as related, that defendant had sold to and through Gibford stock; that Gibford was dead; that was certain, and

that I assumed all the balance I had said, and also said I agreed with the court that my previous remarks should in no manner influence them. He says that, according to his best recollection and
52 belief, the foregoing is a correct representation of what he said I did on trial in relation to the conduct referred to; and further says not.

E. J. ESTEP.

Sworn to and subscribed before me M'ch 29, 1886.

J. H. DEMPSEY, [SEAL.]
Notary Public.

No other or further testimony or affidavits were offered or read by either party on the hearing of said motion; and thereupon the court overruled said motion for a new trial and rendered a judgment against the defendant upon said verdict of the jury; to all of which the defendant then and there excepted.

And then came the defendant and prayed the court to sign and seal this his bill of exceptions and to make the same a part of the record, which is accordingly done.

M. WELKER, [SEAL.]
U. S. District Judge of said District.

53 Know all men by these presents that we, Lewis W. Smith, as principal, and James L. Smith and Mary A. Smith, are held and firmly bound unto Richard J. Bolles in the full and just sum of sixteen thousand two hundred & eighty dollars, to be paid to the said Richard J. Bolles, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a February term, A. D. 1886, of the circuit court of the United States for the northern district of Ohio, east. div., in a suit depending in said court between Richard J. Bolles, as plaintiff, and Lewis W. Smith, as defendant, a judgment was rendered against the said Lewis W. Smith for the sum of eight thousand one hundred and forty dollars, and the said Lewis W. Smith having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard J. Bolles, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Lewis W. Smith shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LEWIS W. SMITH. [SEAL.]
JAMES L. SMITH. [SEAL.]
MARY A. SMITH. [SEAL.]

Sealed and delivered in presence of—
T. E. HOYT.
A. G. SMITH, D. D. S.

Filed and approved May 5th, 1886.

M. WELKER,
Dist. Judge U. S.

54 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, }

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Richard J. Bolles is the plaintiff and Lewis W. Smith is the defendant, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, this 19th day of July, A. D. 1886, and the 111 year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 308. Lewis W. Smith, plaintiff in error, *vs.* Richard J. Bolles. Filed August 2, 1886.

MAY 2 1888
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 308.

LEWIS W. SMITH, PLAINTIFF IN ERROR,

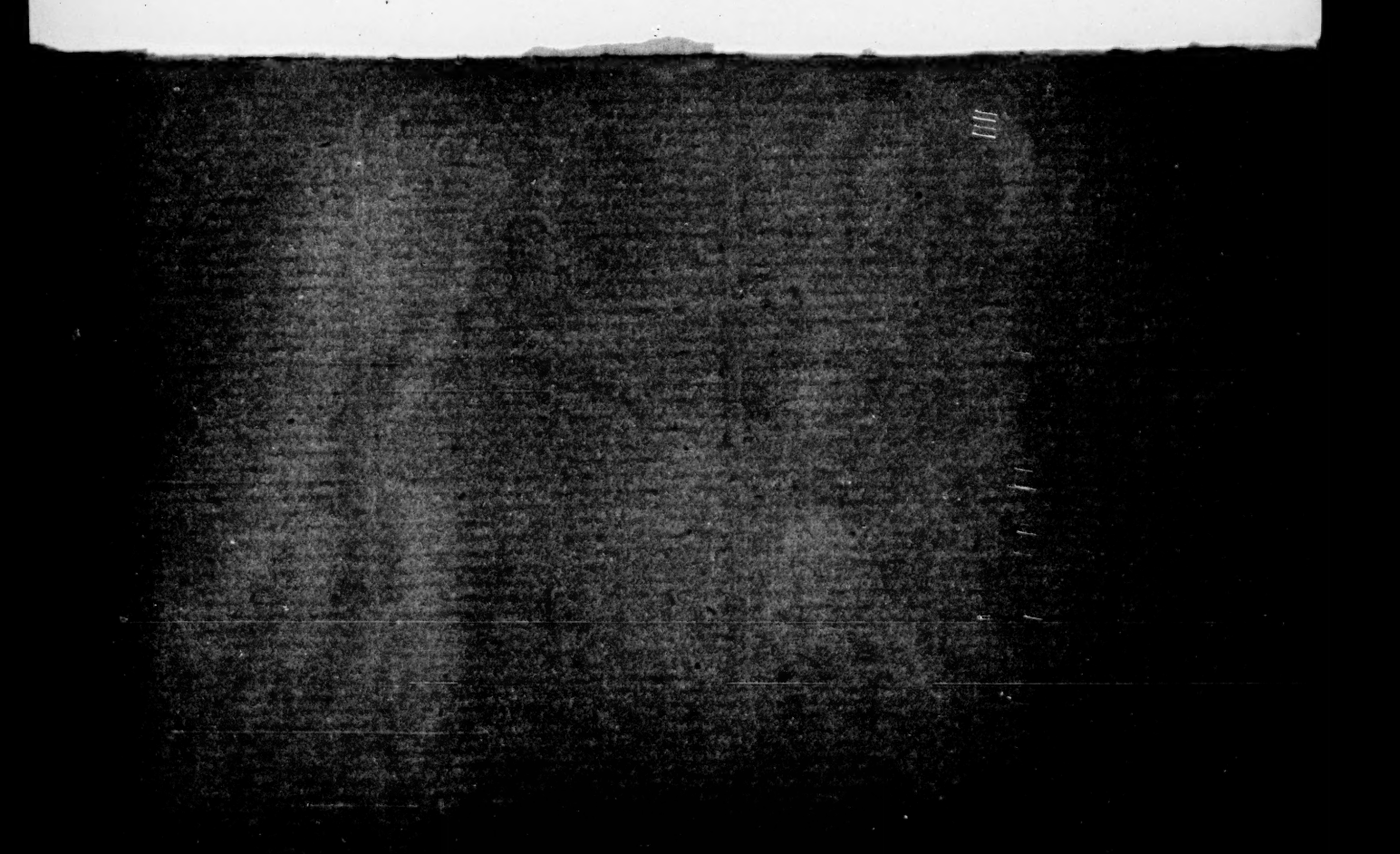
vs.

RICHARD J. BOLLES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

W. W. BOYNTON,
J. C. HALE,
EDWARD H. FITCH,
} Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 308.

LEWIS W. SMITH, PLAINTIFF IN ERROR,

vs.

RICHARD J. BOLLES.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Brief of Plaintiff in Error.

STATEMENT.

The defendant in error brought an action in the Circuit Court for the Northern District of Ohio against the plaintiff in error to recover damages for alleged fraudulent representations in the sale of shares of mining stock. He alleges in substance that some time in October, 1879, the plaintiff in error and Joseph W. Haskins entered into a fraudulent combination to form an incorporated company based on alleged mining property in the territory of Arizona, and for the alleged purpose of mining and milling silver ore for market. That the title to said mining property was in Haskins; that Haskins and the plaintiff in error formed a corporation under the laws of New York under the name of the "Irene Mill and Mining Company," with a capital stock of $2,000,000, divided into 100,000 shares of $20.00 each; that all said shares were transferred to Haskins in consideration of the mining property conveyed to the company, with the exception of 60,000 shares, which as alleged was deposited with the treasurer of said company to be sold to subscribers and purchasers, the proceeds to be applied to the construction of a stamp mill to be connected with such mining property, and for the further purpose of sinking the shaft and tunnel then under process of construction.

The plaintiff below alleged that Smith falsely and fraudulently represented to him in the month of February, 1880, that he had thoroughly examined the mining property owned by the company, and that the same was of great value; that the surrounding country was full of rich paying ore, and that if no ores were taken from the mine owned by the company, large profits could and would be made by milling the ores from the surrounding country; that the mine had a fissure vein 40 or 50 feet wide; and that they had a very large amount of pay ore on dump at the shaft, several hundred tons, enough to run the mill for a long time. He further alleged that Smith had represented that he had procured assays of the ores taken indiscriminately from the ores in the shaft and tunnel, and that it produced from $125 to $150 per ton of silver and portions of it much more and over $200 per ton. That the shaft was more than 100 feet deep and showed good paying ores throughout, and that no investment could be made that could or would result in larger or quicker returns. That he (Smith) had put in his house and lot and cash and had been to examine the mine at an expense of $700 or more, to satisfy himself of its value.

The plaintiff further alleged that relying on these representations, he agreed with Smith to take 4,000 shares of said stock at $1.50 a share, and that he took the same in the month of March, 1880, paying the sum of $6,000 therefor to H. J. Davis who was the treasurer of said company, and received therefor certificates of said stock.

He then alleged that said representations were false and fraudulent, specifically negativing each representation made by Smith, and that the mine was without value, and had it been of the value represented, his stock would have been worth $10 a share; that by reason of the premises he sustained damages to the amount of $40,000.

The plaintiff below for causes of action Nos. 2, 3, 4 and 5, alleged that Smith, the defendant below, made similar representations respectively to John H. Bolles, brother of the plaintiff, by which he was induced to purchase 2,000 shares of said stock at the price of $1.50 per share; to L. W. Marsteller, who was induced to purchase 800 shares of said stock at the price of $2 00 a share; to one Mary Manchester who is not alleged to have purchased any shares of stock, and to one John Van Gassbeck who pur-

chased 2,500 shares of said stock at the price of $2.00 per share, each paying therefor to the treasurer of the company, the amount agreed upon, and receiving from the company certificates of stock representing the number of shares by them respectively purchased; the plaintiff alleged a transfer or assignment before the commencement of the action of the cause of action in favor of each of the above named persons to him, and sought to recover the sum of $60,500, the total damages alleged.

The plaintiff in error answered the petition of the plaintiff below, admitting the incorporation and organization of the Irene Mill and Mining Company, but denied all and singular the remaining allegations of the petition; and further set up affirmatively that the right of action in each of said five causes of action accrued more than four years before the filing of the amended petition; to which new matter set up in the answer, the plaintiff Bolles replied, denying the same, and pleaded that the contract for the purchase of said stock having been made in the State of New York, was subject to the limitation laws of New York, and not those of Ohio.

These causes of action were set up in an amended petition filed March 2d, 1886. The original petition was filed on the 21st day of February, 1884, and the second cause of action in the original petition founded on a claim alleged to have been assigned to the plaintiff by his brother John H. Bolles, sought merely a recission of the contract by which John H. Bolles subscribed for the 2,000 shares of stock, and a recovery back of the money paid therefor. By the amended petiton the action was changed to one for the recovery of damages resulting to John H. Bolles from the fraudulent representations. These were the only issues to be tried.

THE ERRORS ASSIGNED ARE

First:—In permitting the plaintiff below to prove the defendant's pecuniary standing, as appears on the fifth page of this brief.

Secondly:—In permitting the plaintiff below to prove similar representations to those alleged as the foundation of the action, from the witness David M. Strong, at a period remote from those alleged to have been made to the plaintiff as appears on the seventh and eighth pages of this brief.

Thirdly:—In permitting the plaintiff below to put in evidence the

assignment in writing from his brother J. H. Bolles, in the following words and figures, to-wit:

SAN FRANCISCO, Feb. 19, 1884.

For the sum of one (1) dollar and other valuable considerations receipt of which is hereby acknowledged, I, J. H. Bolles, of the city of San Francisco, State of California, hereby assign, set over, demise and release forever unto Richard J. Bolles. of the city of New York, State of New York, all claims, rights, actions, causes of action, suits, dues interest, sums of money, covenants, contracts, controversies, agreements, variances, damages and demands whatsoever, which I ever had or now have against L. W. Smith of the city of Ashtabula, State of Ohio, growing out of my right, title and interest in and subscription to the shares of the capital stock of the Irene Mill and Mining Company, a corporation duly incorporated under the laws of the State of New York and doing business near Globe, Arizona Territory, and growing out of any business relations which the said L. W. Smith had with the said Irene Mill and Mining Company; and I also for the consideration above named, hereby assign, set over, demise and release unto the said Richard J. Bolles, all my right, title and interest in and to any and all shares of the capital stock of the said Irene Mill and Mining Company, which I now have or may be entitled to. J. H. BOLLES, (Seal.)

Fourthly:—In instructing the jury that "the defendant, Smith, was in some way identified with the organization of the company" referring to the Irene Mill and Mining Company.

Fifthly:—In instructing the jury that the measure of recovery is generally the difference between the contract price and the reasonable market value if the property had been as represented to be; and also in instructing the jury that in case the property or stock is entirely worthless, then its value is what it would have been worth had it been as represented by the defendant, and as may be shown in the evidence before you.

Sixthly:—In refusing to instruct the jury that the written instrument marked Exhibit (being the above assignment) from J. H. Bolles to Richard J. Bolles does not assign or transfer the second cause of action stated in the amended petition of the plaintiff to the said Richard J. Bolles.

Seventhly:—In refusing to set aside the verdict and grant a new trial for the following language employed by counsel for the plaintiff in the closing argument to the jury: "Gifford (a person alleged to have purchased stock in the Irene Mill and Mining Company through representations made by the defendant Smith) died of grief because of the fraud perpetrated upon him by this man Smith, and he is as much of a murderer

as though he had killed him." "He (Smith) sold Gifford stock and he is dead; that is certain, and I assume that was the cause."

I.

1. The Court permitted the plaintiff to prove the pecuniary standing of the defendant Smith. In this we claim there was error. The evidence disclosing this proof will be found on pages 23 and 24 of the record. In testifying for himself the plaintiff stated that he had known the defendant Smith since 1876 or 1877, and had occasionally met him in the city of New York during their acquaintance, and had conversations with him about his property. Counsel for the plaintiff then asked the witness the following question:

Q: How shortly before the making of the contract did he say anything about his business?

A: At the time of the purchase of the stock, or about that time, when we were talking it over, he told me his business more than at any other time?

Counsel for the plaintiff then put to the witness the following question:

Q: Tell us what he told you.

A: He told me about the history of his connection with the millinery business in New York principally, and he had drawn money out at first as he had made it there and invested it in Ashtabula in real estate. The other partners had spent their money and when the firm failed, he had his money well saved up; that his investments in Ashtabula had paid very largely; that he had houses and stores, and I think he told me an opera house, or something of that kind in Ashtabula. He estimated himself worth $200,000, he told me.

This testimony was duly objected to and an exception tendered to its admission. It was not received for the purpose of showing that the statements made were false, as they were not, nor were they claimed to be. It was not on this statement nor any part of it that the plaintiff founded his action for recovery. It had no tendency to prove any fact in issue. It was not admissable for the purpose of showing a more ready reliance on in his statements, as the defendant could not insist that the plaintiff was not fully justified in believing his statements to be true. As said by this

Court in *Claflin vs. Ins. Co.* 110 U. S. 95, "No one can be permitted to say in respect to his own statements on a material matter that he did not expect them to be believed."

The testimony could not have been otherwise than prejudicial to the defendant below, by showing his ability to pay any judgment that might be founded on any verdict rendered by the jury. Its effect was to establish the pecuniary responsibility of the defendent to answer in damages for any frandulent representations made. It was not claimed upon the trial that the plaintiff was entitled to exemplary damages, or that the case was one justifying it.

In the 2nd of Greenleaf's Evidence, Sec. 269, (Redfield's Edition,) the rule on the subject is stated as follows: "Nor are damages to be assessed merely according to the defendant's ability to pay, for whether the payment of the amount due to the plaintiff as compensation for the injury, will or will not be convenient to the defendant does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive."

So we find the rule stated in Sedgwick on the Measure of Damages, 277: "Nor will the damages be allowed to be given with any reference to the defendant's wealth or poverty, and if evidence to this point is admitted the verdict will not be allowed to stand." See *Myers vs. Malcolm et al*, 6 Hill, 292.

In *Moody vs. Osgood*, 50 Barb. 633 it is held that "damages in these cases (personal injury) are not to be estimated by, or proportioned to, the wealth of the defendant. Indirect proof of the wealth of the defendant is just as inadmissable as direct proof and for the same reason."

In *Jones vs. Buddington*, 6 Car. & P. 599, which was an action for criminal conversation, it was held by Alderson, B. that "the amount of the defendant's property is not a question in the case."

2. Again on page 24 of the record it appears that one David M. Strong, a resident of Ashtabula, Ohio, was called as a witness, and inquired of if in

the winter of 1880 he purchased of Smith some Irene Mill and Mining Co. stock. To which question the witness answered he did. Then the following questions were put to the witness, and the witness answered as given below; to each of which questions when put and to each of which answers when given, the defendant objected; but the court overruled the objection; to which rulings of the court the defendant at the time excepted. Record pp. 24, 25.

Q: Will you tell the Court and jury about what time it was?

A: I think it was in the winter of 1881, if I am mistaken not. I may be mistaken.

Q: You are mistaken a year about it.

A: It was not far from that. It was in the winter time I recollect or shortly after he came back *to* Arizona.

Q: The first time or second time?

A: Well I do not know that I could state that positively sir.

Q: It appears that he went to Arizona in the fall of 1879 and again in the spring of 1880. Have you got your certificates of stock with you?

A: No sir, I have not.

Q: Well you say you bought it shortly after he came back from Arizona. Is that right?

A: Yes sir; it might have been within a month and it might have been a month after.

Q: And when did you have your interview with Mr. Smith?

A: In his store in Ashtabula.

Q: How did you come to go to his store to have an interview with him?

A: I think I was going by his store, and he was either just going into his door or standing in his store door, and asked me in; walked back to his desk, at the back end of the store and sat down, and he made these statements in regard to the—

Q: I am going to ask you what they were in a moment. When you got in there did you have a conversation with Mr. Smith about the Irene Mine and his visit to it?

A: Yes sir.

Q: I want you to tell what representations Mr. Smith then made to you about this Irene mine and that property.

A: I wish the court to understand that I said in 1880 or 1881 that I bought the stock; I have forgotton which year it was. Mr. Smith says to me, You and I have always been great friends; now, I have got a good thing out there. I have put in my property in New York so and so; I want to let you have some. I told him if he had done what he said he had done, knowing him to be a business man—I do not know that I told him he was a business man, but knowing him to be a business man that had *been* prospered in all his undertakings—I had confidence in him, and he said he had put this in there. I says to him, If you have put that much into it I ain't afraid to put in a little. Therefore I took $6,000 in it.

Q: What, if anything did he say about the shaft or the depth of it?

A: He said it was 150 feet deep; he had been down in it to the bottom; showed me some specimens. He said they will go from $100 to $180 and maybe $200 to the ton; there were six or seven hundred tons.

Q: What did he say about the quantity of ore around the mouth of the mine, on the dump?

A: I think he said from four to five or six hundred tons, and it would go from $100 to $180 per ton. He said one side of the mine was right down on the rock and the other three sides were just as good as the specimens that he showed me. I asked him if he would give me one of those specimens. He said, No; they were not as big as he would like to give me, and he had some big ones he would like to give me, but I have never seen the big ones nor the little ones since. I do not know that I have ever spoken to him but once or twice since. He always scorns me on the street every time he sees me.

Q: What did Mr. Smith then tell you he had put into it himself?

A: He said he had put in his house and lot in New York.

Q: Did he make any statement as to the amount he had put it in for, the value of the house and lot that he put in?

A: I think he called it $30,000 or upwards.

Q: Do you remember any other statement he made to you at the time except those you have stated, about the depth of the shaft and the amount on the dump, and that he put his house into it?

A: Why, he spoke about a mill they wanted to start. He said the mill would pay; make a good investment. I believe that is the way he worded it, or would be a good investment if they never milled a pound of their own ore, for taking it in from other people's mines. He said it was the only mill there was there, and some advantages it had over any other site they would get.

Q: How long after that interview with Mr. Smith in the store until you paid your money and got your stock?

A: I could not tell; my son did the business; he could tell."

The bill of exceptions states (p. 26) that "responsibility of Mr. Smith for the sale of the stock to Mr. Strong was in no way involved in this suit, and the transaction with Mr. Strong the witness, was wholly independent of any of the transactions involved in this suit; but the court admitted this testimony, not for the purpose of proving representations made by defendant to the plaintiff Bolles or his assignors, but as tending to show, if representations made to plaintiff by the defendant were proven and were false and fraudulent, the intent and purpose of defendant to defraud the plaintiff."

It will be seen by this testimony that the witness was careful to state to the court that he wished to be understood that this conversation was in 1880 or 1881, and that he could not tell which year it was. It was therefore clearly incompetent.

There is no doubt of the rule, or rather an exception to the general rule, that where fraud is in issue "evidence of like acts or declarations by the party charged with the fraud at or near the same time" is admissable, as stated by this court in *Lincoln vs. Claflin*, 7 Wall. 138. Where fraud

in the purchase or sale of property is in issue, evidence of other frauds of a like character committed by the same parties *at or near the same time* is admissible.

Its admissibility is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

As stated in *Castle vs. Bullard*, 23 How. 500, "Similar fraudulent acts are admissible in cases of this description if committed at or about the same time, and when the same motive can be reasonably supposed to exist, with a view to establish the intent of the defendant, with respect to the matters charged against him in the declaration."

It was there further stated that "Decided cases have established the doctrine that cases of fraud like the present are among the well recognized exceptions to the general rule that other wrongful acts of the defendant are not admissible on the trial of the particular charge immediately involved in issue." In *Butler vs. Watkins*, 13 Wall. 456, it was held that conversation held in the spring or early summer might be given to show same motive with declarations made in February.

The general rule excludes the testimony offered. The exception has its limitation as above expressed. To enable a party to avail himself of the exception to the general rule, he must bring his case clearly within its terms, and in order to do this, the similar fraudulent declarations that he attempts to show, must be at or near the same time, and it devolves upon the party offering the testimony to bring the same within the exception, by showing affirmatively that such declarations were made so near each other as to afford a reasonable presumption that the same motive inspired both; and when it appears as it did from the testimony of Strong that he could not tell whether he had purchased his stock in the year 1880 or 1881, the case was not brought within the exception, for it as clearly appeared that the conversation had with Smith was in the year 1881 as in the year 1880, and Smith may have had information in the former year that he did not possess in the latter, and may have made the statements, actuated entirely by different motives. The statements made to Bolles

were made not later than February, 1880, and may have had not the slightest connection, in the motives that prompted them, with the statements that he made in 1881. When the witness stated to the court that he wished to be understood that this conversation may have been in 1881 and when it is considered that the sale of stock to the plaintiff below, Bolles, was in the month of March, 1880, the plaintiff certainly did not so far bring the declarations of the witness Strong within the exception to the rule as would entitle him to have them received. It was distinctly stated by the court in ruling on the question as appears on page 26 of the record that the court "admitted this testimony, not for the purpose of proving representations made by the defendant to the plaintiff Bolles or his assignors, but as tending to show if representations made to the plaintiff by the defendant were proven, and were false and fraudulent, the intent and purpose of the defendant to defraud the plaintiff."

How could declarations made in the year 1881 to Strong by Smith have the slightest tendency to show the declarations made to Bolles in the spring of 1880, a year before, were fraudulent? The Court here is bound to say in passing upon this question that the declarations made by the witness Strong (in order to determine the admissibility of this testimony) were made in the year 1881, and if they were admissible, why would not the declarations be equally admissible that were made in the years 1882 and 1883? Where is the limit to be placed unless it be in the language stated in the two cases above cited, that the declarations must have been made so near the same time, that a fair presumption arises that the same motive existed at the time of the two conversations in which the declarations were made.

3. Again the court permitted the witness C. W. Jaques, (page 26 of the record,) a resident of Ashtabula, to testify to a conversation that he had with Smith in 1879, some months before the transaction between Bolles and Smith. The witness referring to the conversation says:

"This, I think was in the spring of 1879; that is my recollection of it; and along during the summer or late in the fall, some time anyhow during 1879, Mr. Smith went West—went out into the Western country—and after his return from his western trip I dropped into his store to wel-

come him back home, and talk matters over with him about his western trip, &c., and he told me of the wonderful country out there, and how entirely undeveloped it was, so far as any machinery of any kind out there for milling any of the ores they were taking out; told me about the wonderful amount of ore that was there and gave me a description of one of their primitive machines for milling the ore; spoke about a mule driving around in a circle and crushing up the ore just as you would crush up dirt in making brick, and he spoke further about an idea he had in his head of putting some machinery there for the purpose of milling this ore; spoke of the inexhaustable supply of ores at different points there, and I asked him about the probable cost of such a machine, and he thought that a company of $50,000 could put up a machine of that kind. That is about the substance of the conversation. That was repeated at different times and dwelt upon later in the winter."

The defendant objected to this conversation, and asked the Court to take it from the jury, which the Court refused to do.

There is not a line or word of this testimony that would give rise to an inference of fraud or fraudulent purpose even if the statements were untrue. It was a statement that the western country was a wonderful country, that it was entirely undeveloped; that they had little machinery there for milling ores; a description of the ores in the mines of the western country; of the mode of crushing ore, comparing it to the mode of making brick in the eastern country, spoke further of an idea he had in his mind of putting in some machinery there for the purpose of milling ore, and spoke of the inexhaustible supply. Witness asked about the probable cost of machinery of this kind, and Smith thought it would cost $50,000 to put up such machinery.

In permitting this testimony to go to the jury, the jury were in effect advised that it had some tendency to show that the statements made by Smith to Bolles in the spring of 1880 were of a similar kind, and made with a fraudulent purpose. We submit that they had not the slightest tendency to show either of the two things. And so with the testimony that the same witness gave on page 27 following this, respecting the number of shares of stock that Haskins had in the company, that the

stock was not to be turned over to Haskins until the mill was completed, and the mine was turning out dividends; "so that we ran no risk on that score, at all," etc. Had the court not refused to take this testimony from the jury we should have thought it entirely immaterial, but in permitting it to go to them, it had the sanction of the court that it had a bearing on the controversy between the parties prejudicial to the defendant. There is nothing in the statement made here of what Smith told this witness that is at all akin to the statement which the plaintiff alleged Smith told him as an inducement to the purchase of the stock of the company.

4th. Again, we claim the court erred in permitting the plaintiff to put in evidence the assignment of J. H. Bolles to the plaintiff, a copy of which is given above. That assignment purports to tranfer to Richard J. Bolles all the claims, rights, actions, causes of action, etc., etc., which J. H. Bolles had against L. W. Smith, *growing out of his right, title and interest in and subscription to* the shares of the capital stock of the Irene Mill and Mining Co. This language is entirely too indefinite to admit of the construction that it carried the cause of action set out as No. 2 in the petition. The cause of action sued on did not grow out of any right, title or interest in, and subscription to the capital stock of the company. It grew out of and originated in independent declarations alleged to have been of a fraudulent character. The shares were purchased of the company. The paper did not purport to transfer to the plaintiff any cause of action that John H. Bolles may have had against Smith for fraudulent representations, by which Bolles was induced to purchase stock from the company. It cannot be said that the assignor intended it as such transfer. The claim made in cause of action No. 2, as stated in the amended petition, was that John H Bolles was induced by the fraudulent representations of Smith to purchase shares of the Mining Company, and to pay therefor $1.50 a share, whereby he was damaged. If these representations were false, the cause of action arising in consequence thereof did not accrue out of "his right, title and interest in and subscription to" the shares of the capital stock of the Irene Mill and Mining Company. The Court not only permitted this testimony to go to the jury, but refused to instruct the jury that it did not operate as a complete

assignment of the second cause of action stated in the amended petition, impliedly telling the jury that it did operate to transfer to the plaintiff a right to recover the damages which John H. Bolles had sustained by reason of the fraudulent representations of the defendant in inducing him to purchase stock of the company. There is nothing in the terms of the contract that would justify any such construction. There is not the slightest reference made to a claim for damages arising out of the fraudulent representations. In order to make this paper carry the assignment of the claim sued on in cause of action No. 2 to Richard J. Bolles, it must have been clothed in some circumstances by parol, showing that John H. Bolles by the execution of this instrument, intended to assign to the plaintiff below, the particular cause of action sued on.

II.

1. Again we claim that the court erred in its instructions to the jury. The plaintiff had offered evidence tending to establish the issues upon his part, and the defendant had offered testimony tending to negative all the facts put in evidence by Bolles, and tending to establish the issues fully upon his part; and consequently the plaintiff gave evidence tending to establish the fraudulent representations which led to the purchase of the stock by himself and his assignors, and that he and they were damaged by reason of such representations. The defendant gave evidence tending to show that he made no false representations respecting the issue of the stock, and also evidence tending to show that the plaintiff had not sustained any damages by reason of the alleged fraudulent representations. The petition alleged a fraudulent combination between Haskins and Smith to create the corporation with a view to defraud. The defendant denied it by his answer. The defendant by his testimony put in issue definitely the claim of the plaintiff that he was connected with the organization and formation of the company. The bill of exceptions shows, as stated on page 29 of the record, that "the defendant also gave testimony tending to establish the fact that he had nothing whatever to do with the organization and formation of the Irene Mill and Mining Company, and had no knowledge of its existence until long after its formation."

Notwithstanding the evidence thus explicitly given that the defendant was not chargeable with fraud in the particular asserted, the court said to the jury that "the defendant Smith was in some way identified with the organization of the company." We submit that this statement of the court to the jury, thus positive in its character upon a vital point in contest and concerning which both parties had given testimony, was a statement not only calculated to prejudice the jury against the defendant, but a direct invasion of its province. A vital question in dispute both by the pleadings and the evidence was thus summarily disposed of by the Court, and that question one of fact, relating distinctly to, and being a part of, the fraud charged. That its effect was injurious no one can doubt. A juror would hardly undertake to settle a disputed question between the plaintiff and the defendant in opposition, or contrary to the expressed opinion of the Court. To say that this was not prejudicial to the defendant is to say what we all know is not true, that the juror pays little attention to the statement of the judge in his charge. In *Walker vs. Stetson*, 14, O. St. 90, the court say "That jurors are constantly inclined to look to the opinion of the judge for instruction as to what is, and what is not evidence; and when he tells them to determine a given problem from the evidence before them, they can hardly do otherwise than inter that in his judgment there is evidence upon which their verdict, when given, may rest." Here the jury were told the fact was established, that Smith was one of the organizers of the corporation, and being so told, they would the more readily believe that he was personally interested in the sale of its stock. It would have been quite as proper for the court to say to the jury that Smith "was some way identified with the fraudulent representations charged." Questions of law are for the court, and questions of fact for the jury; especially so, when the fact is not only in issue but material and vital to the case. If the court can decide one disputed fact for the jury it can every fact, and thereby in effect abolish the right of trial by it.

Again, the Court erred in the statement of the measure of damages. It will be remembered that the shares of stock of this corporation were nominally $20 each. The plaintiff paid but $1.50 per share. He claims that had the mine been of such quality and value as represented by the

defendant below, each share of his stock would have been worth $10.00, and therefore that he sustained as damages the difference between $1.50 and $10 upon each share of his stock; and so as respects the shares of stock bought by the other parties.

The court charged the jury that the measure of recovery is generally the difference between the "contract price and the reasonable market value." We submit that this not the rule. It was of the least consequence in determining the amount of recovery, what Bolles may have paid per share. The measure of recovery was the difference between the actual value of the stock, and its represented value, that is, its value had the mine been substantially as represented to be. It cannot be assumed because the plaintiff has alleged in his petition that the mine was valueless, that the jury so found. The plaintiff sought to recover upwards of $60,000 as damages upon the six causes of action upon which he sued. The amounts that these respective parties paid for their stock when added together was $16,050, and the fact that he recovered only $8,140 shows very clearly that the jury did not regard the stock as without value. The court also said to the jury that if the property or stock was entirely worthless, then its value is what it would have been worth "if it had been as represented by the defendant, and as may be shown in the evidence before you." Here are two conflicting rules. The first that the measure of recovery is the difference between the contract price and the reasonable market value, if the property had been as represented to be. The second, in case the property or stock was entirely worthless, then its value is what it would have been worth if it was as represented. This last rule is undoubtedly the correct rule; but the first rule—the difference between the contract price and the reasonable market value if the property had been as represented to be, may have resulted in serious injury to the defendant. The parties were at wide difference respecting the value of the stock. One claimed it was worth nothing; the other that it was very valuable. Testimony was given to maintain both claims, hence the materiality of the instruction. To test the effect of the rule given, take an example. Suppose testimony had been given tending to show that this stock was worth $5 a share, and that it would have been worth $10 a share had it met the

representation of the defendant. The measure of damages then would have been $5.00 a share. And yet the court said to the jury that the measure of damages was practically $8.50 a share in the case supposed—the difference between the contract price $1.50 and the reasonable market value if the property had been as represented, namely $10 a share.

It cannot be said that the defendant was not prejudiced by this in struction. The statement that the defendant offered evidence tending to establish the issues in his behalf, is equivalent to saying that he offered testimony tending to overthrow all evidence given by the plaintiff to establish his right of recovery; that that affected the measure of damages as well as that that affected the liability. This ruling or instruction was promptly pointed out to the court by an exception, and an opportunity afforded to correct it, but it still adhered to the rule given, and the jury took the instruction with the case, and disposed of it accordingly.

III.

Finally we claim that the conduct of counsel for the plaintiff below in his closing argument to the jury was so prejudicial to the defendant as to show that he had not a fair trial. The misconduct consisted in inflammatory appeals to the jury by statements entirely outside of any testimony adduced upon the trial, made with intent to inflame the feelings of the jury against the defendant, and presumptively having that effect. It appeared in evidence that one Gifford through the defendant, had bought some stock of the company, and that he was dead. Without the slightest relevancy to the proof, or to any evidence in the case, the plaintiff's attorney in the closing argument, charged Smith, the defendent, in the most direct language with murdering Gifford, a person who had purchased stock of the company. The language, as testified to by three persons present was as follows: "Gifford died of grief because of the fraud perpetrated upon him by this man Smith, and he is as much a murderer as though he had killed him." Being interrupted at this point by counsel for the defendant, and the attention of the court being called to the language, the court mildly said to the counsel, "You must not say so;" which was all that was said by the court. Whereupon counsel continuing his argument said to the jury: "He sold Gifford stock and he is dead,

that is certain; and I assume that was the cause." Affidavits on pages 30 and 31 of the record show just what the language was, and the action of the court in relation thereto. The affidavit of counsel employing the language, on page 32, differing as it slightly does with the facts shown by the three affidavits in which the exact language of the counsel, court and objecting counsel is given, does not in the least relieve the case. In that affidavit he distinctly says that he "*drew on his imagination a little by depicting Gifford's death by grief in consequence of the many lies he was induced by the defendant to represent to his friends and the consequent ruin of clerks and salesmen who invested their all in his worthless stock*;" and that after the admonition of the court he did say to the jury: "Smith sold Gifford stock; Gifford is dead, that is certain; and I assume that was the cause." He concedes having reiterated this charge, after the court told him he must not say so;" and of course, made the statement in direct defiance of the direction of the court. It will thus be seen that counsel first charged the defendant with causing the death of Gifford by a sale to him of shares of mining stock in this Irene Mill and Mining Company, and that when told by the court that he "must not say so," or as he says in his affidavit, that "such remarks were outside of the record," he persisted in his statement, thereby insisting on its effect on the jury. To permit the verdict of a jury to be inflamed or affected by such appeals to passion would be a scandal on the administration of justice, and the courts have uniformly so regarded it, and steadily set aside verdicts so affected, or reversed judgments foun led thereon.

In a recent case of *Bullard vs. the Boston & Maine R. R. Co.* 64 N. H. 27, it was held that,

"When counsel in argument makes a statement of a material fact not in evidence against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby."

The facts were as follows: The defendant's counsel in his argument to the jury commented on the fact that one of the physicians consulted by the plaintiff had not been called to testify. The plaintiff's counsel said the reason was because he found, from conversation with him, that he had not examined the plaintiff, and could give no testimony as to her condi-

tion. To this the defendants excepted. The court sustained the exception and told the jury to disregard the statement of the plaintiff's counsel; and thereupon counsel said he would take it all back. Verdict for the plaintiff which defendants moved to set aside. Motion denied and defendants excepted.

Some of the reasoning of the court in giving the opinion is quite pertinent to the present case, when considered in connection with the persistence of counsel in not losing with the jury the effect of the statement that he made. The court say:

"The law does not transfer the defendant's property to the plaintiff as damages without a fair trial, and in the legal sense a trial is not fair when such statements as were made in this case have any influence favorable to the party making them. He is therefore bound to do everything necessary to be done to rectify his wrong and restore to the trial the fairness of which he has divested it. He is legally and equitably bound to prevent his statement having effect upon the verdict. This he cannot do without explicitly and unqualifiedly acknowledging his error and withdrawing his remark in a manner that will go as far as any retraction can go, to erase from the minds of the jury the impression his remark was calculated to make."

The court further held that unless it was affirmatively found by the court that the party whose right was violated was not injured by the statement, the judgment would be reversed.

In the present case, counsel not only did not explicitly and unqualifiedly acknowledge his error, and withdrew his remark, or attempt to erase from the minds of the jury the impression his remark was calculated to make, but he sharpened its sting by repeating the fact charged, not only in the face of objection made by the opposing counsel, but also in disregard of the admonition of the court. The obvious purpose of the reiteration was to secure its lodgment in the minds of the jury. In view of these facts the plaintiff below is not in a position to claim that what he said to the jury had no influence upon them. As was said in *Dougherty vs. Welch*, 53 Conn. 558–60: "No man can be quite certain that he is aware of all the influences which have produced conviction. It is one thing to prevent the entry of an influence into the mind: quite another to dislodge it."

In *Brown vs. Swineford*, 44 Wisc. 282, the court reversed the judgment of the court below and ordered a new trial on an exception of this

kind. Counsel in arguing the case urged the wealth and power of a great corporation with which the defendant was connected, and the defendant's ability to pay any judgment that might be rendered against him; a fact entirely outside of the testimony.

Upon the point the court said:

"The learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence. * * * The appellant took his exception, and his counsel now supports it by numerous cases. * * * * All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume, *arguendo*, such facts to be the case, when they are not. Some of the cases go further and reverse judgments for imputation by counsel of facts not pertinent to the issue but calculated to prejudice the case."

Further on the court adds:

"It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument, but like other difficult and delicate duties, it must be performed by those on whom the law imposes it. It is the duty of the Circuit Court to interfere in all cases on their own motion. It is due to truth and justice; and if counsel persevere in arguing impertinent facts not before the jury, or *in appealing to prejudices foreign to the evidence*, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

In the case of the *Cleveland Paper Co. vs. Banks*, 15 Neb. 20 an action was brought against "B." the president of a corporation for supplies furnished the company. His attorney offered evidence that the secretary of the company had embezzled its funds and appropriated its property. This evidence was excluded. In the argument to the jury the counsel treated the evidence as in the case, and commented on it. It was held to be error for which a new trial must be granted.

In *Grosse vs. the State*, 11 Tex. Ct. App. 377, the district attorney in closing the case stated "he had heard while out on the street a citizen remark that it was a great shame that the defendant should have taken the money of the old man Wucherer, near 71 years old, and all the money he had in the world." Objection was taken to this remark, and it was repeated by the district attorney, and because of it, the Court of Appeals reversed the conviction.

In the same Court, in *Conn vs. State*, 11 Tex. Ct. App. 399, the district attorney stated to the jury that:

"Good men in this county and the best men in Gonzales county, desire the conviction of this man and his partner."

The trial court refused to set aside the verdict because of this language but the Court of Appeals reversed the conviction and sent the case back for a new trial.

In *Willis vs. McNeill*, 57 Tex. 465, it was held error in the Court to allow counsel to discuss before the jury the irrelevant question of the wealth of a party, and to insist that the wealthier the parties the greater should be the amount of damages assessed against them; and that the error was not cured by the failure of the opposing counsel to interpose objection at the time.

In the same court in *Thompson vs. the State*, 43 Tex. 274, the chief justice said:

"Zeal in behalf of their clients or desire for success, should never induce counsel in civil cases, much less those representing the state in criminal cases, to permit themselves to endeavor to obtain a verdict by arguments based upon other than the facts in the case and the conclusions legitimately deducible from the law applicable to them."

In *Barry vs. State*, 10, Ga. 522, the court in commenting upon a similar question and upon the duty of the court to check the argument of counsel, said

"That the practice complained of is highly reprehensible no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind to get that in proof which is merely conjecture, and thus to work a prejudice in the mind of the jury, can not be tolerated. Nor ought the presiding judge to wait until he is called upon to interpose. For it is usually better to trust to the discrimination of the jury as to what is and what is not in evidence, than for the opposite counsel to move in the matter. For what practitioner has not regretted his untoward interference, when the consel thus interrupted resumes, 'Yes, gentlemen, I have touched a tender spot, the galled jade will wince; you see where the shoe pinches.'"

In the case of the *Union Central Life Ins. Co. vs. Cheever*, 36 O. S. 201, the court below permitted counsel for the plaintiff in argument to the jury, to read and comment upon a circular not in evidence; nor relevant to the issue, and which was prejudicial to the opposite party, and it it was decided by the court to be an irregularity or an abuse of discretion which prevented a fair trial, and for which the verdict should be set aside and a new trial ordered.

In the *State vs. Poland*, 85 N. C. 576, counsel for the State in his argument to the court upon a motion for a mistrial on the ground of alleged fraud in selecting the jury said, that two of the jurors had gone into the

box "with souls blackened with perjury and bribery." This was said in the presence and hearing of the jury then empanelled. The opposing counsel objected, but the State's attorneys persisted in the use of similar language towards the jurors during the trial without being seriously interfered with by the Court.

The trial court refused to stop the prosecution and in the end the defendant was convicted. The Supreme Court reversed the conviction and awarded a venire de novo. In delivering the opinion the Court say:

"To secure for the administration of the law that general respect and confidence which it is of the highest public interest it shall enjoy, it is absolutely essential that the business of the courts should be conducted with becoming dignity and gravity; that their judgments should seem to be temperately considered and impartially delivered; and above all that the verdict of the jurors concerned should be known to be the result of serious convictions in dispassionate and free deliberations. Appreciating this great necessity extending alike to the public interests and individual security, our courts have been constant in the purpose to protect the juries of the country from the approach of every circumstance which might tend unnecessarily to excite their minds, or inflame their prejudices."

In *Butler vs. Slamm*, 50 Penn. St. 459, it was said that counsel

"Owe a duty not only to the court but to the client, and that is, never to insist on aids to success clearly wrong, either in law or in fact."

In *The People vs. Mitchell*, 62 Cal. 411, it was held error for counsel to state facts not proven or sought to be proven, and to place unsworn evidence before the jury; and when improper evidence is admitted on the one side this will not authorize improper evidence on the other. It is error sufficient to reverse a judgment for counsel without objection, to state facts pertinent to the issue and not in evidence, and to assume, *arguendo*, such facts to be in the case when they are not. In this case, *Brown vs. Swineford*, 44 Wisc. 291 above referred to, was expressly approved, the court in disposing of the case, saying: "The rule is supported by principle, and in this State by precedent, and, as we believe, by the great weight of authority everywhere."

In *Tucker vs. Hennecher*, 41 N. H. 322, the court say:

"We also think the court erred in permitting counsel for plaintiff to proceed with his argument upon facts not in evidence and having no proper bearing upon the questions in issue, after their attention had been called to the matter and their interposition sought, although the course of remark permitted might have seemed to be excused by the previous allusions of the defendants' counsel to considerations scarcely more pertinent or proper. No fault of the opposite counsel could justify a repetition of that fault by his

opponent The jury are sworn to render a true verdict in every case, according to the law and evidence given, and the well-established rule of judicial proceedings confines the arguments of counsel before them to comments upon and suggestions in relation to that law and evidence. It would seem utterly vain and quite useless to caution jurors in the progress of a trial against listening to conversations out of the court-room in regard to the merits of a case, if they are to be permitted to listen in the jury-box to statements of facts calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of zealous, learned, and interested counsel."

In *Rolfe vs. the Inhabitants of Rumford*, 66 Me. 564, it was held to be error for the presiding justice to permit counsel in addressing the jury against seasonable interposition to proceed with his argument upon certain facts not in evidence, and having no legitimate pertinency to the issue. In the opinion the court say:

"Courts have usually been very firm whenever occasion has required in confining counsel within proper and seasonable bounds to whatever is pertinent to the matter on trial. Statements of alleged facts not adduced in evidence and comments thereon are irrelevant, not pertinent, and are therefore clearly not within the privilege of counsel and any such practice on the part of counsel should be promptly checked especially when objected to by the other side."

In the case of *Winter vs. Sass*, 19 Kans. 556, commenting upon the effect of traveling out of the evidence in an argument by counsel the court say:

"Whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside."

In *Fry vs. Bennett*, 3 Bosw. Reps. 202 it was held to be indispensable to the proper administration of justice that counsel on either side should not be allowed to lose sight of the evidence and of the issues and indulge in denunciations of the party based on the assumption of facts not attempted to be proved, and which should not be permitted to disturb that calm deliberation which it is the duty of jurors to bestow, and which the parties have a right to expect and demand.

In *Brownlee vs. Hewitt*, 1 Mo. App. p. 360, counsel were sent out of the court room to argue the case to the jury, out of the presence of the judge before whom the case was tried; and improper remarks being made to the jury calculated to prejudice the jury, a new trial was granted upon the application of the aggrieved party. It appeared that the cause was argued in the absence of the court and that remarks fell from the lips of one of the

counsel, which would not have been permitted in the presence of the court. It is not stated what these remarks were, but the court say:

"The action of counsel during the closing argument was strongly insisted upon as ground for new trial and is also urged here. The record shows affidavits filed in support of the motion for a new trial tending to show that the counsel for the plaintiff pursued a line of argument before the jury which no court would have tolerated for a moment, and that the jury were thus inflamed by statements in regard to witnesses and to material facts in the case, that were wholly unwarranted by the evidence. It is true that counter-affidavits are filed, but enough appears uncontradicted in regard to the course of argument to the jury which counsel for the plaintiff permitted himself to pursue, to satisfy us that the substantial rights of the defendant—rights in which he would have been protected had the argument been conducted in the presence of the court—were seriously invaded in the concluding argument. Against this in the absence of the court the defendant had no redress. We cannot say how far the verdict of the jury may have been influenced by these illegal proceedings, and we think it was error to overrule the motion for a new trial filed herein based upon this action of the court, and the immediate consequence of this action as shown by the affidavits which make part of the record. For these errors the judgment of the Circuit Court is reversed and the case remanded."

In the *State vs. Lee*, 66 Mo. 167, the court condemned in strong language remarks made by the prosecuting attorney to the effect that "the defendant's character was bad, and that therefore his attorneys dare not attempt to prove his good character on trial." The court remarking that such conduct of the prosecuting attorney was condemned in the case of the *State vs. Kring*, 64 Mo. 591, and will be as often as it is properly brought to the notice of this court. It should not be tolerated in civil proceedings and will not be in criminal cases."

In I. Hayne "New Trial and Appeal" Sec. 50 the author says:

"Comparatively few men are capable of analyzing their mental processes sufficiently to distinguish the effect produced on their minds by any particular portion of a complex case. Many are swayed by prejudices which they hardly acknowledge to themselves, and it is proverbially difficult to divest one's mind of a prejudice. It cannot be exercised at the mere bidding of another. If the truth could be known it would probably be found that very many verdicts are the result of prejudice and feeling, and it seems a farce to allow counsel to excite the prejudices and passions of the jury, and to mislead them by statements of facts not in evidence, and then simply to tell them that they are not to be influenced by the course pursued. It is a case where prevention is better than cure."

The case of *Wolffe vs. Minnis*, 74 Ala. 386, was a case where counsel lauded his client as follows: "Judge Minnis, gentlemen is a large-hearted, great-souled man, confiding and trusting. He is not one of those grasping men who keep a strict account of every cent they spend. If a poor widow should come to him and tell him she was without bread, as quick as

thought he would run his hand into his pocket, and pulling out a $10 bill he would say, Here, take this and go buy a barrel of flour." The defendant's counsel called the attention of the court to these remarks, and objected to same upon the ground that there was no evidence in the case to support them. Thereupon the plaintiff's counsel said: Oh well, I will take it back. The defendant's counsel said to the court: The defendant insists on his objection. But the court did not withdraw the remarks from the jury and took no action in reference thereto. For this error the judgment was reversed. In delivering the opinion the court say, speaking of the language complained of, that

"Coming as it did, from able, eminent counsel, it was well calculated to exert an improper influence on the minds of the jurors. The court might, and probably should have arrested it *ex mero motu*. It is one of the highest judicial functions to see the law impartially administered, and to prevent as far as possible all improper extraneous influ- from finding their way into the jury-box.

In *Bessette vs. State*, 101 Ind. 86, it was held to be the duty of the trial court to control and direct the argument of counsel, and where the prosecuting attorney was permitted over objection to comment upon the personal appearance of the defendant, not as a witness nor on account of his manner and bearing as such, but as indicating a probability of guilt, or to refer to a particular juror as having become prejudiced in the case, it was such error as would reverse the judgment.

In *Perkins vs. Guy*, 55 Miss. 153, it was held that counsel should no be permitted in argument to the jury to speak or comment on facts not proven. The judge should, *sua sponte*, interpose and correct any such irregularity. The court say:

"Within the limits of the testimony, the right of argumentation, illustration and comment is free, but that freedom does not extend to the assumption of facts not in evidence as the basis of argument, to the prejudice of the adverse party."

In *Martin vs. the State*, 63 Miss. 505, the defendant was tried for an attempt to murder. In the course of the argument the prosecutor said: "The defendant is a man of bad, dangerous and desperate character, but I am not afraid to denounce the butcher boy, although I may on returning to my house find it in ashes over the heads of my defenceless wife and children."

Respecting the use of this language, the court said:

"Such declaration would inevtably tend to prejudice the jury against the prisoner. If the court fails to interfere of its own motion and the abuse of privilege is of such a character as to produce the conviction that injustice resulted therefrom, the duty of the court is to apply the corrective by awarding a new trial. For the error committed in the argument of counsel the judgment is reversed.'

In the case of the *People vs. Dime*, 59 Mich. 550, the prosecuting attorney in the argument of the case asserted that he "knew that the defendant was the man who took the money." It was held to be so far improper that if the presiding judge failed to caution the jury regarding the same, it was error for which the judgment would be reversed: that it cannot be said that the statement was error without prejudice, for it is impossible to tell what influence it had upon the jury."

These adjudications speak a uniform language to the effect that extraneous matter which may have affected injuriously the rights of a party will always find a remedy, even in cases where the parties are not at an unequal advantage. The language of counsel in the present case was the more calculated to injure the defendant and prejudice the case from the very great disadvantage at which he was placed. There was acombination of purchasers of stock against him, although he did not own a share of the stock that either had bought, nor receive a farthing of the money paid. They all united their claims in the plaintiff for recovery in one action. The testimony of each, smarting under the lost hope of dividends expected to be realized, and all having a common purpose, was produced, and given. Evidence from outside persons stating similar representations was received; all interested to establish the defendant's liability with a view to ultimate recovery by them. In connection with this front and side fire, a charge of causing the death by grief of a friend who joined in buying stock in this mining company, was grossly unwarranted, and calculated to create a prejudice in the minds of the jury so seriously affecting the defendant's rights as to prevent a fair trial.

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SUPREME COURT

—OF THE—

UNITED STATES.

LEWIS W. SMITH,

Plaintiff in Error.

VS.

RICHARD J. BOLLES,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF DEFENDANT.

E. J. ESTEP,
Attorney.

HATCH PRINTING CO., CLEVELAND, O.

IN THE SUPREME COURT

OF THE UNITED STATES.

LEWIS W. SMITH,
vs.
RICHARD J. BOLLES.

No. 308.
Error.

The record is very meager; does not pretend to set out the evidence, nor the charge of the Court, but simply states that plaintiff below "offered evidence tending to prove the material allegations of his petition," and that defendant Smith "gave evidence to the jury tending to maintain the issues of the case in his behalf." See pages 23 and 29. The plaintiff contends in his brief, page 13, that this shows a case of conflicting evidence. That, while one offered testimony tending to show the fraud complained of and the damages sought to be recovered, the other gave evidence tending to show that he made no false representations, and that the plaintiff had not sustained any damage. The character of the record is such that it does not enable the Court to see and know all that occurred at the trial and understand the connection between that which does appear and that which is omitted,

and which, if present, might make isolated questions and answers as they now appear, very proper.

Counsel in their brief argue seven assignments of error. The first three refer to the admissibility of certain testimony.

1. The first relates to certain questions and answers put to and made by Bolles, page 23 of record. No question was put as to the pecuniary standing of Smith. It did appear that Smith had made some communications about his business at the time the stock was purchased, and our questions simply called for what was said on that subject in connection with the representations complained of. They tended to show he was a careful, prudent man and to inspire confidence that in this mining matter he was equally careful, and might be relied on as dealing with something that had merit. For this purpose and because the statements were part of the transaction resulting in the sale of the stock and made at the same time, we regarded both as competent. The defendant objected to the whole answer as given, and not to that part which gave his own estimate of what he was worth. It was not directly responsive to the question, and if he had asked the Court to strike out that part of the answer, it might have done so, but the objection is to the whole, and, in that view, we think the Court was right. We admit it did not have a tendency to prove any of the charges of fraud enumerated in the petition directly, but his state-

ments as to his business and cautious management of his property did have a tendency to impress the mind of his victim with the idea that he was dealing with a cautious, prudent business man, and need have no fear of an investment recommended by him, and put him off his guard as to investigating further into the character of the mine. That it did have that effect, was abundantly shown. We used it for no other purpose, and believe it to have been properly admitted.

The Supreme Court of New York, in Hubbard vs. Briggs, 31 N. Y., 538, says: "The case was one of fraud, and ordinarily such a case is not capable of being established by direct affirmative proof. Any evidence having a tendency, though it may be slight, to establish fraud, is not incompetent. Necessarily considerable latitude is to be allowed in giving evidence of circumstances tending to prove the fraudulent intent, etc."

They next refer to the testimony of David M. Strong. The right to use such testimony for the purpose of showing the intention of Smith in making representations to Bolles is not in dispute. See plaintiff's brief, page 8. Counsel for Smith say it should have been excluded be cause too remote from the time of the transaction with Bolles. The witness bought some of the same stock, and the representations made to him related to the same stock. The subject matter was, therefore, proper. The sale to Bolles was in March, 1880. The witness says it

was in 1880 or 1881. If in 1880, what time in the year? It was shortly after the return of Smith from Arizona. The testimony did show, and this particular evidence indicates that he was twice in Arizona, once in the fall of 1879, and once in the spring of 1880. If within a month or thereabouts of his return from either trip, the authorities quoted by counsel would make it admissible. How can this Court say what time in 1880 the declarations were made? If in the spring or early summer of 1880, the Court is sustained by plaintiff's brief. We think this Court should infer or presume that the testimony then before the Court and jury did enable them to determine that the time in fact was within the reasonable exception to the general rule. Suppose the testimony showed at the time that Smith was twice to Arizona, as before stated, and the witness knew that this conversation was shortly after his return, but was under a wrong impression as to dates, would not the Circuit Court, having the whole facts before it, consider all the testimony to see whether the representations were within a reasonable time before or after the Bolles transaction? Now, this is just what the Court did, and, having ample means to determine, did overrule the objections. We think the testimony of C. W. Jaques, pages 26 and 27, shows the time of these trips to Arizona to have been as heretofore stated. We cannot agree with counsel (see page 10 of brief) that this Court is bound to say the conversation

occurred in 1881 in order to test the rule. No such obligation exists, and, in the nature of things, cannot exist, because it would require the Court to arbitrarily fix the time without regard to the testimony and make for the parties a different case from the one tried.

As to the testimony of C. W. Jaques, we have but little to say. The record shows but the introductory part of his evidence. C. W. Jaques was the tenant of Smith, and bought some of the same stock of him in the spring of 1880 under false representations. What appears in the record preceded this, and was merely "laying the ropes" to subsequently catch him and other neighbors, which he subsequently did, and if the testimony were all in the record as the trial Court had it, this Court would not have a doubt of the admissibility of the whole for the purpose received.

Again, counsel complain there was error in the admission of the assignment of J. H. Bolles to R. J. Bolles, page 28. The record shows that the second cause of action was to recover damages sustained by J. H. Bolles and assigned to plaintiff. The action as to this count is brought under Sec. 4993, Revised Statutes of Ohio. The trial Court held that the claims set out in the 3rd, 4th, 5th and 6th counts could not be maintained because it appeared that the Assignors retained an interest in case of recovery, and they were excluded from the jury. Counsel in their brief, page 13, say: "In order to make

this paper carry the assignment of the claim sued on in cause of action No. 2 to Richard J. Bolles, it must have been clothed in some circumstances by parol showing that John H. Bolles by the execution of this instrument intended to assign to the plaintiff below the particular cause of action sued on." The record, page 28, shows that the plaintiff, "having given other oral evidence tending to show ownership of the claim, offered in evidence the written assignment made by John H. Bolles, etc." Now, what was this other evidence? The record is silent. They admit that if it showed circumstances tending to show the intention to assign, then it would be good. Why not have set it out? We say it did show that the assignment was transmitted by mail from California to the plaintiff in New York, and that the same letter or package contained the identical stock received by John H., and the object and intention was to transfer this identical claim. All of which was ample, on the theory of the brief to have authorized the Court to send the paper to the jury. The admission being that oral testimony might make it competent, and the record showing that other testimony was given without showing its character, this Court will not presume that it did not contain the quality required.

2. Counsel next claim there was error in the charge of the Court, and, as in the statement of evidence, little extracts are given without connection with the whole

charge, so that this Court cannot fairly, without the whole, determine if the Judge were wrong.

The short sentence complained of first is: "The defendant Smith was in some way identified with the organization of the Company." Suppose the Judge to have been stating the issues to the jury, and to have said that the plaintiff claimed that "the defendant Smith was," etc. This context would show it all right. The petition does allege that Smith combined with Haskins in the fall of 1879 to organize this Company, and that it was organized under the laws of New York in October, 1879. The record shows that Smith did go to Arizona in the fall of 1879, and that the plaintiff gave evidence tending to show the truth of his petition. Take these statements with the verdict, and we think it was true. Counsel say, page 14, "We submit that this statement of the Court to the jury, thus positive in its character, *upon a vital point* in contest and concerning which both parties had given testimony, was a statement not only calculated to prejudice the jury against the defendant, but a direct invasion of its province." Was it a vital question in the case whether Smith was connected with the start of the Company or not? The question was: What did he say or do when he sold the stock? Was he guilty of false and fraudulent representations at that time by which the plaintiff was deceived and parted with his money? If he was, it makes no difference whether he assisted in

the organization six months before or not. The rule in Ohio as to the Judge refraining from remarking upon the testimony and carefully leaving the entire effect of it to the jury is not followed in the Federal Courts, and hence the gentlemen's reference to 14 O. S. can have little to do with the case.

The next claim of counsel is that the Court erred in its statement of the measure of damages. The matter complained of is: "The measure of recovery is *generally* the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you." This is the general rule in cases of fraud in the sale of property. What modifications were made before or after the statement so copied in the record, does not appear. The Court does not state that this general rule is applicable to the case before it. This rule applies to all cases where the party making the representations and sale owns the stock or property and receives the money. In this case, the money was paid to Davis, the Treasurer of the Company, and stock delivered by him. The sale was made and money paid by reason of Smith's fraudulent representations. The contract was with him, not the Company. The case was in some respects like Crater vs.

Binninger, 33 N. Jersey, 513, in that the Court said: "But where the sale itself is the product of fraud, the vendee may either repudiate the contract, or claim by way of damage the difference between the price paid by him and the real value of the property. This I regard as the general and well established rule." The Court, in the same case, and which we think applicable to this case, say: "But the present case has peculiar characteristics which seem to require a modification of the ordinary rule by which damages are measured in case of fraudulent sales. The plaintiff in this instance, by reason of the fault of the defendant, became something more than a mere purchaser of real estate. By the fraudulent practice of the defendant, the plaintiff was induced to embark in a speculation. * * * Starting, then, from the position that the jury, on the trial of this cause, have found the fact that the plaintiff was induced to enter into this speculation by the falsehood of the defendant, it seems to me clear that in conformity to well settled legal rules we must hold the defendant answerable for the loss of *the moneys* which the plaintiff, without fault on his part, lost in this speculation."

The case to some extent is like Hubbard vs. Briggs, 31 N. Y., 518. In that case the plaintiff was induced by the false representations of the defendant to subscribe $5,300 to the stock of the Miller's Bank of Clyde. This subscription was secured by bond and mortgage, which

security was, under the law, passed over to the comptroller for the benefit of bill holders, and, being held for that purpose, defense to its collection could not be maintained as between the comptroller and plaintiff. The Court said, "Indeed, it is not controverted now, as it could not be, that where a person asserts a falsehood, with a fraudulent design, and damage results therefrom, though he may have no interest in the deception, nor colludes with the party who has it, it is ground for civil action." Again, "It was not important for the purpose of maintaining the action, if his affirmation were false and made with intent to deceive and effected the object to the plaintiff's injury, whether he had any interest in making them or not."

We averred that the stock and mine were wholly without value, and counsel admit we gave evidence tending to prove it, and we may add that the jury found it or them wholly worthless. Under the law we were entitled to, as the minium to be made good, our loss. Mr. Bolles had paid $6,000, induced by the fraud of Smith. The lowest amount, therefore which could be awarded us was that sum with interest. We claimed at the trial that under any circumstances we were, in any event, entitled to this amount. The petition avers the money to have been paid sometime in the month of March, 1880. Our recollection is that the testimony showed the payment by R. J. Bolles to have been completed March 20,

1880. If so, then the verdict of $8,140.00 is exactly the sum paid and interest from March 20, 1880, to March 1, 1886, the day of the commencement of the trial.

As to the J. H. Bolles claim, the same went to the jury with directions from the Court that, if the parol facts showed any interest in him, it was to be excluded. We think the verdict shows it was excluded and nothing but the claim of the plaintiff considered, If this be true, then, under no circumstances was the defendant injured. The jury found the fraud, the intent and injury, and rendered verdict for the lowest possible amount, to-wit, the money paid and interest, and nothing for speculation.

We assert that under the circumstance this Court, without the whole charge of the Court, cannot say there was error in the mere statement of a *general rule*, without application to the special case tried, and without injury to the defendant, and whether it embraces a contradiction or not, as claimed in the brief.

Counsel have not argued their exceptions to the refusal of the Court to charge as requested, and we suppose for the very reason that they concluded with ourselves that the J. H. Bolles claim was excluded by the jury and did not enter into the verdict.

3. The next and last effort of counsel relates to what is claimed to have amounted to misconduct on the part of counsel for the plaintiff, so prejudical to the defendant as to show that he had not a fair trial.

The petition and case were under the Ohio Code or practice as adopted by Congress. Section 5307 is as follows: "The applicatian for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be made within three days after the verdict or decision is rendered, unless such party is unavoidably prevented from filing the same within such time."

The record shows that the verdict was rendered March 16, 1886, (page 20;) that the motion for a new trial, containing all other assignments was filed March 17, 1886, (page 21.) That this particular assignment was filed by way of amendment March 27, 1886, (page 21.) On the day it was so filed, the plaintiff, by counsel, at the time, objected, for the reason that the motion, as it appeared, was not filed within the three days, and to the granting of leave at the time excepted. (Page 22.)

In 21 O. S., 637, the Court say: "There was no error in the Common Pleas not noticing the motion to set aside the verdict. The motion was made after judgment, and there was nothing to show that it was made within the three days after verdict."

Section 5308 says: "The application must be made by motion upon written grounds filed at the time of making the motion."

In 21 O. S. above, the motion was made under the original Section 299 of the Code, 2nd Swan & C., page 1033, but which is identical with Section 5307 of the Revised Statutes. The record showed verdict and judgment at October Term, 1867, and says "thereupon the plaintiff moved to set aside the verdict on the ground, etc.," without giving date or alleging that it was filed within three days.

In Nebraska, where it is said the Ohio Code was copied and adopted, they have twice held that if not filed within the three days, it was of no avail. (See 3 Neb., 446 and 6 Neb., 532.) In King vs. Redmond, 2 W. L. M., 554, the District Court of Athens County held that: "Where a party has filed motion for a new trial and afterwards withdrawn it and prayed the Court to proceed to enter up judgment, he cannot of right file a second motion, although the three days after the rendition of the verdict have not expired."

Our Statute, Sec. 5114 is very liberal on the subject of amendments, but under it, liberal as the Code is, our Supreme Court has held that an amendment making a new party does not relate back so as to prevent him from pleading the Statute of Limitations, if it expired before he was made such new party and had not expired when the action was commenced.

Also in an action of ejectment where the plaintiff had not correctly described one of the parcels of land,

and subsequently upon discovery of the mistake asked leave to amend, that, in such case, if the 21 years expired before the amendment, the Statute might be pleaded and maintained, because it was a new description of property not before in the case.

Now, why is not this the same in principle? The limitation is three days; a motion is filed in time, specifying the grounds (see page 21;) ten days afterwards an amendment is permitted on an entirely new ground; on its face it says it is in addition to the grounds in the original motion. It does not come within any of the exceptions mentioned in the law. It was as well known at the close of the trial as when filed March 27, 1886. Can this Court, under such circumstances notice it or consider it? If a new motion had been filed March 27th, the Court would repudiate it at once. Is any new virtue added to it by calling it an amendment? We think not, and that this Court is barred from looking into this alleged error because not filed in time.

But suppose the Court does look into it, what does it amount to? The record fails to show any part of the evidence relating to Smith's connection with Gifford, as that the Court cannot refer to it to establish the proposition that Counsel, against objection, stated facts pertinent to the issue and not in evidence, or that there were no facts before the jury from which counsel might infer that Gifford died of grief because believing in Smith, and at

his request, he made the same representations to fellow employees, and through him and in that way lost their money; that he, by reason thereof, was discharged, took sick and died. Three affidavits were filed by Smith, and appear in the record (pages 30 and 31.) In the first, that of Stephen A Northway, not one word is said about the evidence, whether the remarks were outside or inside of the testimony, or whether there was any testimony on the subject or not.

The rule is, as stated in 44 Wis., 282, and quoted in plaintiff's brief, "That it is error sufficient to reverse a judgment for counsel, against objecton, to state facts pertinent to the issue and not in evidence, or to assume, *arguendo*, such facts to be in the case when they are not."

This first affidavit is wholly barren of any statement that such matters were not in evidence or did not appear so that the argument of counsel might be held a fair inference therefrom.

The second affidavit made by W. W. Boynton is a transcript of the first, and just as barren of any statement as to the evidence as the first. It nowhere states that the remarks were without evidence. Neither of them claim that counsel stated facts not in evidence or that he assumed such facts to be in evidence when they were not. Each undertakes to set out what counsel said, but neither lays the foundation for the objection required by law to authorize the Court to interfere.

The third, by Thomas Fricker, is a transcript of the two former, and nothing different can be said about it.

If, in order to make such matter error, it must be a statement of facts not in proof, or an assumption by way of argument that such facts were in evidence, when they were not, then the claim is without foundation, and there is nothing for the Court to act upon. We think the case in 44 Wis. the leading case in the country and believe in its doctrines, but regard it as a very different case from the one at bar. In that case the Court said: "The learned counsel went beyond the legitimate scope of an argument by *stating and commenting* on *facts* not in evidence." The Court had before it the evidence offered to the jury, and was able to say that no evidence appeared to have been given on the subject, and remarks that the learned counsel undertook in his argument to supply this want of evidence, and shows other matters as to the opening and closing, making it more reprehensible than usual. Nothing of the kind appears here. The testimony is not before the Court in any form. How can it then say that counsel went outside of the record or argued inferences not warranted by the testimony?

In Hayne on New Trials, Sec. 50, page 156, it is said: "But when the evidence is conflicting, the Court should not interfere with counsel's statement of its effect, and whenever counsel *may infer any particular result from the evidence, however improbable such result may be,*

the court should not restrain him from arguing upon such result."

The author cites as authority for the text:

Halther vs. The State, 18 Ga., 464.

Logan vs. Monroe, 20 Me., 259.

Now, suppose the testimony to have been of the character described in the affidavit of E. J. Estep, (page 32). Was not the inference justifiable under this rule that Gifford died of grief under the circumstances, and that Smith was the cause of his misfortune? The testimony is admitted in the brief of counsel to have been conflicting. The testimony as shown by the affidavit of E. J. Estep shows a foundation for the inference drawn to the jury, and we think was justifiable to the extent admitted. We also think that after objection sufficient was said to withdraw anything objectionable, if before said; i. e. Gifford was dead; he became sick and died under the circumstances stated, and that the balance, that he died of grief because of conduct influenced by Smith, was his own inference, was not in evidence, and did not belong to the case. We think the jury so understood it and that consequently no injury was done to Smith.

Respectfully submitted,

E. J. ESTEP,

Attorney for Defendant in Error.